2008 Legal Update

CALIFORNIA COMMISSION ON PEACE OFFICER STANDARDS AND TRAINING

2008
LEGAL UPDATE

TELECOURSE REFERENCE GUIDE

THE MISSION OF THE CALIFORNIA COMMISSION ON PEACE OFFICER STANDARDS AND TRAINING IS TO CONTINUALLY ENHANCE THE PROFESSIONALISM OF CALIFORNIA LAW ENFORCEMENT IN SERVING ITS COMMUNITIES

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For additional information contact:

California Commission on Peace Officer Standards and Training
TRAINING PROGRAM SERVICES BUREAU
1601 Alhambra Boulevard
Sacramento, CA 95816

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TABLE OF CONTENTS

II. TRAFFIC LAW

III. FIREARMS LAW

IV. CASE LAW

SUBSTANTIVE LAW

Table of Contents (Continued)

SEARCH & SEIZURE LAW

Table of Contents (Continued)

INTRODUCTION

Each year, California peace officers are accountable for enforcing dozens of new laws enacted by the state legislature, and every month, officers are expected to abide by new case decisions from the courts.

This annual telecourse training program provides a comprehensive overview of new legislation and case law decisions impacting California law enforcement in 2008. The program presents all new general, traffic, and firearms law changes and case decisions that will have the biggest impact on the peace officers' role in California.

The first part of the program features legislative updates, while the second part of the program presents case law review and updates in laws related to interrogation, search and seizure, and more.

This telecourse reference guide is designed to be used in conjunction with the DVD training course. Materials are arranged to follow along the program sequence. Blank space has been provided to write notes, record information not included in the text, or to jot down questions.

Questions regarding this program should be directed to Jody Buna, Senior Law Enforcement Consultant, Training Program Services Bureau at the Commission on POST, (916) 227-4896.

CHANGES IN

GENERAL LAW ENFORCEMENT

LAWS

PEACE OFFICERS: IMPERSONATION: UNIFORMS

Penal Code Section 538d
Chapter 241 / Assembly Bill 1448

SUMMARY: It is unlawful to sell a law enforcement uniform to someone who is not an employee of a law enforcement agency.

HIGHLIGHTS:

- Existing law makes it a crime for a person, who is not a peace officer, to impersonate a peace officer, as specified.
- This law would require law enforcement uniform vendors to verify that a person buying a uniform is an employee of the law enforcement agency identified on the uniform.
- This law would make it a crime for a vendor selling a law enforcement uniform to fail to verify the person buying the uniform is an employee of the law enforcement agency identified on the uniform, unless the uniform is sold as a prop, as specified.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Uniform vendors must check identification of individuals buying law enforcement uniforms.

NOTES:

CRIME INFORMATION: DISCLOSURE: CONSIDERATION

Penal Code Section 146g (Added)
Chapter 401 / Assembly Bill 920

SUMMARY: It is now unlawful for peace officers, officers of the court, or court employees to sell prohibited confidential information obtained during the course of a law enforcement investigation or an unauthorized photo or video taken inside a secure area of a law enforcement or court facility. It is also unlawful for someone to solicit another person, for financial gain, confidential information or an unauthorized photo or video.

HIGHLIGHTS:

- Existing law prohibits the dissemination or disclosure of certain personal information of peace officers, as specified.
- This law would provide that certain persons who, for financial gain, disclose or solicit the exchange of information obtained in the course of a criminal investigation, with the knowledge that the disclosure of the information is prohibited, as specified, would be guilty of a misdemeanor punishable by a fine not exceeding $1,000.
- The law would also provide that those same certain persons who, for financial gain, solicit or sell any photograph or video taken without authorization inside a law enforcement or court facility, as specified, would be guilty of a misdemeanor punishable by a fine not exceeding $1,000.
- The law would also provide that any person who, for financial gain, solicits any of those certain persons to disclose information obtained in the course of a criminal investigation, the disclosure of which is prohibited, or who, for financial gain, solicits any of those certain persons to disclose any photograph or video taken without authorization inside a law enforcement or court facility, as specified, would be guilty of a misdemeanor punishable by a fine not exceeding $1,000.
- The law would also require, upon conviction, the forfeiture of monetary compensation received for the commission of any of the offenses described above, as specified.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Peace officers, officers of the court, or court employees who sell confidential information obtained during the course of a law enforcement investigation may be charged with a misdemeanor.

NOTES:

CRIME: ASSAULT AND BATTERY: VICTIMS

Penal Code Section 241
Chapter 243 / Assembly Bill 1686

SUMMARY: An assault against a Parking Control Officer is subject to an enhanced sentence of $2,000 and 6 months in County jail.

HIGHLIGHTS:

- Under existing law, an assault committed against a person employed in a specified position, including, peace officers, custodial officers, firefighters, emergency medical technicians, lifeguards, process servers, and traffic officers, when the person committing the battery knew or should have known the victim was engaged in the performance of his or her duties is a misdemeanor, punishable by imprisonment in the county jail not exceeding one year.

- This law would define parking control officers as persons employed by a city, county, or city and county to monitor and enforce state laws and local ordinances relating to parking and would make it a misdemeanor to assault a parking control officer engaged in the performance of his or her duties if the person committing the assault knew or should have known the victim was a parking control officer, punishable by imprisonment in the county jail not exceeding 6 months or by a fine not exceeding $2,000, or by both the fine and imprisonment.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: The sentence is enhanced for assaulting a parking control officer.

NOTES:

WIRETAPS: EXTENTION

Penal Code Section 629.98
Chapter 391 / Assembly Bill 569

SUMMARY: Wiretaps have been extended to January 1, 2012.

HIGHLIGHTS:

- Existing law regulating government interception of electronic communications, as specified, remains in effect only until January 1, 2008.
- This bill would extend the effective date to January 1, 2012.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Wiretaps have been extended to January 1, 2012.

NOTES:

CRIME: ALCOHOLIC BEVERAGES

Business and Professions Code Sections 25500, 25503.6, 25631, and 25658
Chapter 744 / Assembly Bill 1739

SUMMARY: This law allows minor decoys to be used by law enforcement to apprehend "other persons" who sell, give or furnish alcohol to minors, besides those licensed to do so. It also requires law enforcement to notify ABC when a citation is issued. It also clarifies when it is 2 a.m.

HIGHLIGHTS:

- Existing law prohibits the sale, giving, or delivering of, or the knowing purchase of, an alcoholic beverage between the hours of 2 a.m. and 6 a.m. of the same day, as a misdemeanor.
- Existing law provides that on the day that a time change occurs from Pacific standard time to Pacific daylight saving time, or back again to Pacific standard time, 2 a.m. means 2 hours after 12 p.m. of the day preceding the change.
- This law would provide that, during a change from Pacific standard time to Pacific daylight saving time, or back again, 2 a.m. means 2 hours after midnight.
- Existing law prohibits the sale of alcoholic beverages to, or the purchase of alcoholic beverages by, persons under the age of 21 years, and imposes penalties in that regard, but permits minors to be used as decoys in the enforcement of these provisions to apprehend licensees, or employees or agents of licensees, who sell alcoholic beverages to minors. The act provides that a violation of this prohibition is punishable as a misdemeanor.
- Existing law also requires that, after the completion of each minor decoy program, the law enforcement agency using the decoy shall notify licensees of the results of the program. Under the act, the law enforcement agency is additionally required to notify a licensee within 72 hours when the use of a minor decoy results in a citation.
- This law would expand this provision to allow minors to be used to apprehend licensees, or employees or agents of licensees, and other persons who both sell or furnish alcoholic beverages to minors.
- This law would also require the law enforcement agency to notify the Department of Alcoholic Beverage Control when the use of a minor decoy results in the issuance of a citation.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Minor decoys may apprehend "other persons" selling alcohol and ABC must be notified when a licensee is cited for 25658.

NOTES:

FIREFIGHTERS: BILL OF RIGHTS

Government Code Section 3250-3262 (Added)
Chapter 591 / Assembly Bill 220

SUMMARY: The Firefighters Procedural Bill of Rights Act is added to the Government Code.

HIGHLIGHTS:

- The Public Safety Officers Procedural Bill of Rights Act prescribes various rights of public safety officers, as defined, with regard to representation, discrimination, discipline, and interrogation, as specified.
- This law would enact the Firefighters Procedural Bill of Rights Act to prescribe various rights of firefighters, defined as any firefighter employed by a public agency, including a firefighter who is a paramedic or emergency medical technician, with specified exceptions.
- The bill would prescribe rights related to, among others, political activity, interrogation, punitive action, and administrative appeals, with specified requirements imposed upon the employing agency and the imposition of a civil penalty for a violation thereof.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement officers involved in investigations of firefighters need to afford them the same rights as law enforcement.

NOTES:

FIREFIGHTERS: CHARITABLE SOLICITATIONS

Business and Professions Code Section 17510.25 (Added)
Chapter 446 / Senate Bill 582

SUMMARY: Firefighters and law enforcement may solicit funds while standing in a public roadway.

HIGHLIGHTS:

- Existing law requires certain disclosures to be made prior to a solicitation or sales solicitation for charitable purposes.
- This law would authorize a charity, as defined, to engage in a solicitation for charitable purposes that involves persons standing in a public roadway soliciting contributions from passing motorists, if the persons to be engaged in the solicitation are specified law enforcement personnel, firefighters, or other persons employed to protect the public safety of a local agency, as defined, and if, not later than 10 business days before the proposed solicitation is to begin, the charity files an application, containing specified information, with the city, county, or city and county having jurisdiction over the location or locations where the solicitation is to occur.
- The law would also require the charity to provide proof of a valid policy of liability insurance, as specified. The bill would require the city, county, or city and county to approve the application within 5 business days of the filing date of the application, but would authorize the city, county, or city and county to impose reasonable conditions in writing that are consistent with the intent of these provisions and that are based on articulated public safety concerns.
- The law would specify that its provisions are not intended to prevent a local agency from adopting an ordinance regulating the time, place, or manner of charitable solicitations in a public roadway by other persons or charities.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Firefighters, and law enforcement if they so chose, may lawfully participate in the annual “fill-the-boot” charitable fund raising campaign.

NOTES:

IDENTIFICATION DEVICES: SUBCUTANEOUS IMPLANTING

Civil Code Sections 52.7 (Added)
Chapter 538 / Senate Bill 362

SUMMARY: No one may coerce, or compell any other individual to undergo the subcutaneous implanting of an identification device.

HIGHLIGHTS:

- Existing law accords every person the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his or her personal relations, subject to the qualifications and restrictions provided by law.
- This law would prohibit a person from requiring, coercing, or compelling any other individual to undergo the subcutaneous implanting of an identification device, as defined.
- The law would provide for the assessment of civil penalties for a violation thereof, as specified, and would allow an aggrieved party to bring an action against a violator for damages and injunctive relief, subject to a 3-year statute of limitation, or as otherwise provided.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This bill has a negligible effect on law enforcement.

NOTES:

CRIME: MISUSE OF VOTER INFORMATION

Elections Code Sections 2138.5 & 18111 (Added)
Chapter 305 / Senate Bill 768

SUMMARY: This law makes it unlawful to disclose confidential voter registration information.

HIGHLIGHTS:

- Existing law requires individuals and organizations that distribute voter registration cards to return the completed cards from voters to the appropriate elections official or to deposit the cards in the postal service within 3 days of receiving them.

- Existing law also provides a procedure that permits an elector to entrust his or her completed affidavit of registration to another person for return to the appropriate elections official.

- This bill would provide that an affiant's driver's license number, identification card number, and social security number are confidential and would make it an infraction, punishable by a fine not to exceed $500, except as specified, for any person, individual, or organization to knowingly disclose this information from an affidavit of registration or a voter registration card that was distributed to a voter, or entrusted by the elector to another person.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is an infraction for any person, individual, or organization to knowingly disclose voter registration information from an affidavit of registration or a voter registration card that was distributed to a voter, or entrusted by the elector to another person.

NOTES:

CRIME RECORDS: VICTIMS OF SEX OFFENSES

Government Code Section 6254
Penal Code Section 293
Chapter 578 / Senate Bill 449

SUMMARY: Child annoying and other offenses are added to the sex offenses that are protected from disclosure under the California Public Records Act.

HIGHLIGHTS:

- The California Public Records Act requires state and local agencies to make public records available upon receipt of a request that reasonably describes an identifiable record not otherwise exempt from disclosure by express provisions of law, and upon the payment of fees to cover the associated costs.
- The act expressly exempts from disclosure the names and addresses of victims of specified crimes, at the victim's request or the victim's parent or guardian if the victim is a minor.
- This law would expand the category of crime victims whose names and addresses are not subject to disclosure under the act, to include additional sex crimes.
- Existing law provides that the victim of a sex offense may request that his or her name and address not be a matter of public record, although the victim's name may be disclosed to certain law enforcement officials for official business, even if the victim requested to keep his or her name and address confidential.
- This bill would expand the types of crimes deemed to be sex offenses that are subject to those disclosure limitations to include annoying or molesting a child under 18 years of age.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: The following penal code sections are protected from disclosure if desired by the victim, legal guardian or parent; 265, 266, 266 (a), 266 (b), 266 (c), 266 (e), 266 (f), 266 (j), 267, 269, 288.3, 285, 288.7 and 647.6.

NOTES:

DOMESTIC VIOLENCE: COUNSELORS

Evidence Code Sections 1037.1, 1037.2, 1037.4 & 1037.5
Penal Code Section 679.05
Chapter 206 / Senate Bill 407

SUMMARY: Domestic violence counselor definition is expanded to include someone paid or non-paid with at least 40 hours of training.

HIGHLIGHTS:

- Existing law generally provides that no person has a privilege to refuse to be a witness or to refuse to disclose any matter or produce any writing, object, or other thing. However, a victim of domestic violence has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication, as defined, between the victim and a domestic violence counselor, as specified.

- This law would, among other things, expand the scope of the privilege by expanding the definition of a domestic violence counselor.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Communication between domestic violence counselor and victim is privileged and may only be ordered to be disclosed by the court in specified circumstances.

NOTES:

PROTECTIVE ORDERS: ANIMALS

Family Code Section 6320
Chapter 205 / Senate Bill 353

SUMMARY: Protective orders may now include family animals.

HIGHLIGHTS:

- Existing law authorizes a court to issue an ex parte order enjoining a party from engaging in specified acts against another party, including threatening or harassing that party, and, in the discretion of the court, against other named family or household members. A violation of this court order constitutes contempt of court, which is punishable as a misdemeanor.

- This law would additionally authorize the court to include in a protective order a grant to the petitioner of the exclusive care, possession, or control of any animal owned, possessed, leased, kept, or held by either the petitioner or the respondent or a minor child residing in the residence or household of either the petitioner or respondent.

- The law would authorize the court to order the respondent to stay away from the animal and forbid specified acts with respect to that animal.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement needs to be aware that protective orders may now include family pets.

NOTES:

ANIMALS: BITES: OWNER INFORMATION

Penal Code Section 398 (Added)
Chapter 136 / Assembly Bill 670

SUMMARY: This law makes it unlawful for the owner of an animal that bit another person to not come forward and identify themselves no later than 48 hours after the incident.

HIGHLIGHTS:

- Existing law makes it a misdemeanor or a felony for a person owning or having custody or control of a mischievous animal to negligently allow the animal to cause serious bodily injury to another person, as specified.

- This bill would require a person who owns or has custody or control of an animal to, as soon as is practicable, but no later than 48 hours thereafter, provide identifying information to another person when the person knows, or has reason to know, the animal bit the other person, as specified. Failure to provide the required information would be an infraction, punishable by a fine of not more than $100.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is now an infraction to not come forward and identify yourself if your animal bites someone when the owner has reason to know the biting occurred.

NOTES:

INMATES: PROHIBITED ITEMS

Penal Code Section 4575 (Added)
Chapter 655 / Senate Bill 655

SUMMARY: The law makes the unauthorized possession of a wireless communication device by a person in a local correctional facility a new misdemeanor. Tobacco products may also be illegal to possess if the county board of supervisors adopts an ordinance or resolution to that effect.

HIGHLIGHTS:

- Existing law prohibits possession or use of tobacco products by inmates under the jurisdiction of the Department of Corrections and Rehabilitation, as specified.
- Existing law generally regulates the conditions of incarceration for prisoners in a local correctional facility.
- This law would provide that the unauthorized possession of a wireless communication device, as specified, by a person in a local correctional facility is a misdemeanor, punishable by a fine of not more than $1,000.
- This law would also provide that possession of tobacco products, as specified, by a person housed in a local correctional facility is an infraction punishable by a fine not exceeding $250 if that facility is located in a county in which the board of supervisors has adopted an ordinance or passed a resolution banning tobacco in its correctional facilities.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement officers working in correctional facilities should know that it is now unlawful for an inmate to possess an unauthorized cell phone, pager, or wireless internet device.

NOTES:

CRIME: DISORDERLY CONDUCT

Penal Code Section 647 (e) (Removed)
Chapter 302 / Senate Bill 425

SUMMARY: The previous 647 (e) involving an individual refusing to identify themselves to law enforcement is removed from the penal code.

HIGHLIGHTS:

- Under existing law, a person is guilty of disorderly conduct, a misdemeanor, based on various acts, including if the person loiters or wanders upon the streets or from place to place without apparent reason or business and refuses to identify himself or herself or account for his or her presence to a law enforcement officer in circumstances making that identification reasonable.
- This bill would delete the above provision.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: The section that was deemed uncontstitutional in 1983 in Kolender v. Lawson 461 U.S. 352 has been deleted from the penal code and section 647 has been renumbered accordingly.

NOTES:

CRIME: CRIMINAL PROFITEERING: VEHICLES

Penal Code Section 186.2
Chapter 111 / Assembly Bill 924

SUMMARY: This law adds vehicle theft to the list of crimes that can be charged as Criminal Profiteering Acivity.

HIGHLIGHTS:

- Existing law defines “criminal profiteering activity” as any act committed or attempted or any threat made for financial gain or advantage, which act or threat may be charged as one of several specified crimes.
- This bill would add offenses involving vehicle theft to that list of specified crimes.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: 10851 V.C. is added to the list of offenses charged under 186.2 of the penal code, Criminal Profiteering.

NOTES:

MENTAL INCAPACITY: DELETION OF DEMEANING TERMINOLOGY

Penal Code Sections 26 & 31, Harbors and Navigation Code Section 4005
Labor Code Section 4662
Chapter 31 / Assembly Bill 1640

SUMMARY: The terms idiot," "imbecility," and "lunatics" when referring to mentally incompetent is being replaced with "mentally incapacitated".

HIGHLIGHTS:

- Existing law uses terms "idiot," "imbecility," and "lunatics" when referring to mentally incompetent persons with regard, respectively, to certain notice provisions for construction of a wharf or chute, certain workers' compensation injuries, and persons who are not capable of committing a crime or who encourage others to commit crimes.

- This law would delete those references, and would, instead, refer to persons who are mentally incapacitated, and would declare the intent of the Legislature not to adversely affect existing case law using those terms.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This bill has a negligible effect on law enforcement.

NOTES:

CRIME: MILITARY DECORATIONS

Military and Veterans Code Section 648.1 (Added)
Chapter 360 / Assembly Bill 282

SUMMARY: This law makes it an infraction for a person, with the intent to defraud, to, orally, in writing, or by wearing any military decoration, as defined, falsely represent himself or herself to have been awarded any military decoration.

HIGHLIGHTS:

- Existing law provides that it is a misdemeanor for a person to falsely represent himself or herself as a veteran or ex-serviceman, or member of the Armed Forces of the United States, as specified.
- This bill would provide that it is an infraction for a person, with the intent to defraud, to, orally, in writing, or by wearing any military decoration, as defined, falsely represent himself or herself to have been awarded any military decoration.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is now unlawful for a person, with the intent to defraud, falsely represent himself or herself to have been awarded any military decoration.

NOTES:

SEX REGISTRANT: DENTIST

Business and Professions Code Sections 1687 (Added)
Chapter 13 / Senate Bill 252

SUMMARY: A dentist required to register as a sex offender may no longer practice in California.

HIGHLIGHTS:

- Existing law, the Dental Practice Act, provides for the licensing and regulation of the practice of dentistry by the Dental Board of California, in the Department of Consumer Affairs, and authorizes the board to deny, revoke, or suspend a license for specified reasons.
- Existing law requires persons convicted of certain sex offenses to register as sex offenders, as specified.
- This law would, with regard to an individual who is required to register as a sex offender, require the board to deny an application for licensure, renewal, or reinstatement of, or to revoke, a license under the Dental Practice.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement needs to know that it is unlawful to practice dentistry in the State if convicted of a sex offense that requires registration.

NOTES:

CRIME: KANGAROO IMPORTS

Penal Code Section 653o
Chapter 576 / Senate Bill 880

SUMMARY: Lawfully harvested kangaroo products may be sold commercially until January 1, 2011.

HIGHLIGHTS:

- Existing law provides that it is a crime to import for commercial purposes, possess with intent to sell, or sell any part or product of the dead body of a kangaroo punishable by a fine between $1,000 and $5,000, imprisonment in the county jail not to exceed 6 months, or both fine and imprisonment, for each violation.

- This law would, until January 1, 2011, provide that these provisions shall not apply to kangaroos that may be harvested lawfully under Australian national and state law, the federal Endangered Species Act of 1971, and applicable international conventions, provided that the Department of Fish and Game is annually informed of statistical information regarding the commercial harvest of kangaroos, as specified.

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WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement may encounter athletic or other leather gear made from lawfully harvested kangaroos. It is no longer illegal to possess these items.

NOTES:

CRIMES: SEX OFFENDERS

Health and Safety Code 1522, 1568.09, 1569.17, and 1596.871
Penal Code Sections 289.5, 290.01, 290.04, 290.05, 290.3, 290.46, 296.2, 311.11, 646.9, 801.1, 803, 1202.7, 1417.8, 3000, 3000.07, 3004, 3060.6, 5054.1, and 5054.2
Section 288.3 and 3005 (Amended and Re-numbered) 290.001, 290.002, 290.003, 290.004, 290.005, 290.006, 290.007, 290.008, 290.009, 290.010, 290.011, 290.012, 290.013, 290.014, 290.015, 290.016, 290.017, 290.018, 290.019, 290.020, 290.021, 290.022, and 290.023 , Section 290 (Repealed and Added)
Chapter 579 / Senate Bill 172

SUMMARY: Sections of 290 of the Penal Code have been re-numbered. Duplicate section 288.3 of the Penal Code dealing with arranging a meeting with a minor has been re-numbered as section 288.4.

HIGHLIGHTS:

- Existing law provides for various penalty provisions related to sex offenders.
- This law would make nonsubstantive, conforming changes to those provisions.
- The law would make clarifying changes to provisions related to the risk assessment tool to be used to identify sex offenders, and would make related technical changes.
- Existing law requires persons who have been convicted of specified crimes, and other persons as required by a court, to register as a sex offender.
- Existing law sets forth the procedure for doing so.
- This law would reorganize and renumber the provisions that set forth that procedure, and would make conforming technical changes in related provisions of law.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Penal Code Sections 290 and 288.3 have been changed. New Section 288.4 has been added to the Penal Code

NOTES:

CRIMINAL STREET GANGS: INJUNCTIONS

Penal Code Section 186.22a
Chapter 34 / Senate Bill 271

SUMMARY: District Attorneys and City Attorneys may now file actions against criminal street gangs deemed a nuisance.

HIGHLIGHTS:

- Existing law allows the Attorney General to maintain an action for money damages on behalf of a community injured as a result of a nuisance created by gang activity, as specified.
- This law would, in addition, allow any district attorney or any prosecuting city attorney to maintain the action for money damages, as specified.

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WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement may now seek a nuisance injunction through the District Attorney or City Attorney against a criminal street gang and no longer has to go through the Attorney General.

NOTES:

CHANGES IN

TRAFFIC

LAWS

SPEED LIMITS: SCHOOL ZONE

Vehicle Code Section: 22358.4
Chapter 384 / Assembly Bill 321

SUMMARY: This new law provides that a local authority may, by resolution or ordinance, establish a prima facie speed limit of 15 miles per hour (mph) when approaching at a distance of less than 500 feet from a school building or the grounds thereof, and 25 mph when approaching at a distance of 500 feet to 1,000 feet from a school building or grounds. These prima facie limits would only apply in residence districts with a maximum posted speed limit of 30 mph immediately prior to and after the school zone.

HIGHLIGHTS:

This new law amends Section 22358.4 of the Vehicle Code (VC) by adding the following provisions to those already existing. A local authority may, by ordinance or resolution, establish a prima facie speed limit of 15 mph when approaching at a distance of less than 500 feet from a school building or grounds, and 25 mph when approaching at a distance of 500 feet to 1,000 feet from a school building or grounds.

These prima facie limits would apply only to roadways in residence districts with the following conditions:

1) A maximum of two traffic lanes.
2) A maximum posted 30 mph prima facie speed limit immediately prior to and after the school zone.

The prima facie limits proposed by this bill would apply to all lanes of an affected highway in both directions of travel. When determining the need to lower the speed limit, the local authority would be required to take the provisions of Section 627 VC into consideration. Appropriate signs giving notice of the reduced speed limit would have to be erected for the ordinance or resolution to be effective.

A local authority must take into consideration the provisions of 627 VC, but an actual traffic and engineering survey does not have to be done.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Although this new law could lower the prima facie speeds limits in school zones where deemed appropriate by a local authority, officers must still use “unsafe speed for conditions” (Section 22350 VC) as the basis for issuing a citation. It may be difficult to justify unsafe speed if there is no engineering and traffic survey justifying the 15 mph speed limit on that roadway.

NOTES:

VEHICLE CODE: OMNIBUS

Vehicle Code Sections: 12500, 12810.5, 15210, 22450 and 22452
Chapter 630 / Assembly Bill 1728

SUMMARY: This new law is an omnibus bill that makes several corrections to various Vehicle Code sections that are currently erroneously cross-referenced with other previously amendment sections. Besides making several technical, non-controversial modifications, this bill adds a subdivision specific to stop signs at railroad crossings within Section 22450 of the Vehicle Code (VC).

HIGHLIGHTS:

- Section 12500 VC was amended to authorize a person with a valid California driver's license of any class to operate a short-term rental motorized bicycle without taking a special examination for the operation of a motorized bicycle and without having a class M2 endorsement authorizing the operation of that class of vehicle.

- Section 12810.5 VC corrects a reference to paragraph 5 of subdivision (a) of Section 15278 VC, relating to negligent operators of a vehicle carrying hazardous materials.

- Section 15210 VC corrects a reference to paragraph 5 of subdivision (a) of Section 15278 VC relating to a definition of a "commercial motor vehicle."

- Section 22450 VC was amended to divide the current provisions contained in subdivision (a) into two subdivisions. Subdivision (a) now pertains just to the requirement of stopping at an intersection. Subdivision (b) pertains to the requirement of stopping at a railroad grade crossing.

- Section 22452 VC was amended to correct a reference to subdivision (d) of this section relating to specific vehicles that do not need to stop at a railroad grade crossing. Existing law generally requires certain vehicles, including school buses and hazardous material transporters, to stop before a railroad grade crossing and look and listen for trains before proceeding, except in specified situations.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement officers need to be careful to use the correct subdivision when citing for stop sign violations, Section 22450 VC. Subdivision (a) is used for stop sign violations occurring at highway intersections. Subdivision (b) is used for stop sign violations occurring at railroad grade crossings.

Operators of short-term rental motorized bicycles are no longer in violation of 12500 VC provided they have a valid California driver's license of any class.

NOTES:

DRIVING UNDER THE INFLUENCE: REPEAT OFFENSE

Vehicle Code Sections: 13353.1, 13353.2, 13389, 22651, 23154, 42009, and 42010 Chapter 749 / Assembly Bill 1165

SUMMARY: This new law prohibits a convicted driving under the influence (DUI) offender from operating a motor vehicle with a blood alcohol concentration (BAC) of .01 percent or greater while on probation for DUI. This law creates a new provision that authorizes peace officers to impound a vehicle operated by a convicted DUI offender with a BAC of .01 or greater while on probation for DUI. Additionally, this law creates a new provision that suspends the driving privilege of any convicted DUI offender if they are operating a motor vehicle with a BAC of .01 percent or greater while on probation for DUI. **These provisions become effective January 1, 2009.**

HIGHLIGHTS:

Section 13353.1 and 13353.2 of the Vehicle Code (VC) was amended to add a provision stating that a person on probation for DUI who refuses to submit to a Preliminary Alcohol Screening (PAS) test for a violation of Section 23154 VC (person on probation for DUI that drives with a BAC of .01 percent or greater) will have his/her license suspended for one to two years.

Section 13389 VC was added to authorize a peace officer, when the officer has reasonable cause to believe that the person is in violation of Section 23154 VC, to request a person who is on probation for DUI, to submit to a PAS test. The peace officer must serve a notice of an order of suspension to the person if the PAS test results are .01 percent BAC or greater or if the person refuses to submit to the PAS test.

Section 22651(h) VC was amended to authorize a peace officer to store a vehicle when an officer serves a notice of an order of suspension pursuant to Section 13389 VC.

Section 23154 VC was added to prohibit a person who is on probation for DUI to operate a motor vehicle at any time with a BAC of .01 percent or greater. This violation is an infraction.

Section 42009 VC was amended to add Section 23154 VC to the list of violations eligible for the construction zone penalty enhancement.

Section 42010 VC was amended to add Section 23154 VC to the list of violations eligible for the Safety Enhancement – Double Fine Zone penalty enhancement.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Effective January 1, 2009, peace officers will have the authority to issue a citation, serve a notice of an order of suspension, and tow a vehicle when the driver is on probation for DUI and is driving a vehicle with a BAC of .01 percent or greater. Additionally, a conviction for Section 23154 VC could be used to violate the person's probation conditions if forwarded to the District Attorney.

NOTES:

WIRELESS TELEPHONES

Vehicle Code Sections 12810.3, 23123
Chapter 290 Stats. 2006 / Senate Bill 1613

SUMMARY: This bill from the 2006 legislative session makes it an infraction to operate a motor vehicle while using a wireless telephone without a hands-free device. This section does not apply to people using a wireless telephone for emergency purposes or to emergency services professionals using a wireless telephone while operating an authorized emergency vehicle. This section does not apply to a person using a digital two-way radio service that utilizes a wireless telephone if such telephone is utilized in a way that would not require it to be in the immediate proximity of the ear while operating a motor truck or truck tractor that requires either a Class A or Class B driver's license, an implement of husbandry, farm vehicle, tow truck, or a commercial vehicle that is registered to a farmer and driven by the farmer or an employee of the farmer under specified conditions. **This law becomes operative on July 1, 2008.**

HIGHLIGHTS:

This law adds Section 12810.3 VC. This section states that a violation of Section 23123 VC will not result in a violation point count.

This law adds Section 23123 VC.

- Subdivision (a) prohibits a person from driving a motor vehicle while using a wireless telephone unless it is used in a hands-free fashion.
- Subdivision (b) establishes a fine of $20 for a first offense and a $50 fine for each subsequent offense.
- Subdivision (c) provides an exemption for any person to use a wireless telephone for an emergency purpose.
- Subdivision (d) exempts emergency personnel driving an authorized emergency vehicle so long as the use of the wireless telephone is during the course and scope of their duties.
- Subdivision (e) allows a person to use a digital two-way radio service that utilizes a wireless telephone if such telephone is utilized in a way that does not require it to be in the immediate proximity of the ear while operating a motor truck, truck tractor that requires either a Class A or Class B driver's license, an implement of husbandry, farm vehicle, tow truck, or a commercial vehicle that is registered to a farmer and driven by the farmer or an employee of the farmer, and is used in conducting commercial agricultural operations, including, but not limited to, transporting agricultural products, farm machinery, or farm supplies to, or from, a farm.
- Subdivision (f) exempts a person driving a school bus or transit vehicle that is subject to Section 23125 VC.
- Subdivision (g) exempts a person driving a motor vehicle on private property.
- This law becomes operative on July 1, 2008, and will remain in effect until July 1, 2011.

Effective July 1, 2011, the push to talk exception is repealed and no push to talk exemptions will exist.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This law becomes operative on July 1, 2008. Officer may stop a driver talking on a wireless telephone without the use of a hands-free device.

NOTES:

MINORS: WIRELESS TELEPHONES AND DEVICES

Vehicle Code Sections: 12810.3, 23123 and 23124
Chapter 214 / Senate Bill 33

SUMMARY: This new law prohibits a person who is under the age of 18 years from operating a motor vehicle while using a wireless telephone, even when equipped with a hands-free device, or while using a mobile service device. This new law provides an exemption for the use of wireless telephones or mobile service devices for emergency purposes. Additionally, law enforcement officers are prohibited from stopping a driver for the sole purpose of determining whether these provisions have been violated. **This law becomes effective on July 1, 2008.**

HIGHLIGHTS:

This new law amended Section 12810.3 of the Vehicle Code (VC) to provide that a violation point count would not be given for a conviction of Section 23123 VC or Section 23124 VC.

Section 23124 VC was added to prohibit a person who is under the age of 18 years from operating a motor while using a wireless telephone, even when equipped with a hands-free device, or while using a mobile service device. This section provides an exemption for the use of wireless telephones for emergency purposes, including, but not limited to, an emergency call to a law enforcement agency, health care provider, fire department, or other emergency services agency or entity. Additionally, law enforcement officers are prohibited from detaining a driver for the sole purpose of determining whether this section has been violated.

The term “mobile service device,” as used in this section includes, but is not limited to, a broadband personal communication device, specialized mobile radio device, handheld device or laptop computer with mobile data access, pager, and two-way messaging device. A violation is an infraction punishable by a base fine of $20 for a first offense and $50 for each subsequent offense. This law will become operative on July 1, 2008.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT:

Section 23124 VC is a secondary offense, meaning law enforcement officers are prohibited from detaining a driver for the sole purpose of determining whether this section has been violated. Officers should enforce this section only when a primary violation has been observed. When enforcing this section, officers are not required to seize the wireless telephone as this is not an element of the offense. Determinations of use, emergency or otherwise, are matters for the court.

Unlike last year’s SB 1613, this new law prohibits a person who is under the age of 18 years from operating a motor vehicle while using a wireless telephone, even when equipped with a hands-free device, or while using a mobile service device. Also, the provisions of Section 23123 VC from SB 1613 do not apply to a person operating a two-way radio that operates by depressing a push-to-talk feature when driving specified vehicles (commercial vehicles, tow truck, certain farm vehicles, implement of husbandry). Persons under the age of 18 are not allowed to use a two-way radio with a push-to-talk feature while operating a motor vehicle.

NOTES:

MOTOR VEHICLES: SMOKING WITH MINOR PASSENGERS

Vehicle Code Section: 12814.6
Health and Safety Code Sections: 118948, 118949
Chapter 425 / Senate Bill 7

SUMMARY: This law makes it illegal for a person to smoke in a motor vehicle, whether in motion or at rest, when a person under 18 years of age is also present in the vehicle. Law enforcement officers are prohibited from stopping a vehicle for the sole purpose of determining whether the driver is in violation of the provisions of this law.

HIGHLIGHTS:

- Section 118948 of the Health and Safety Code (HS) was added to prohibit any person from smoking a pipe, cigar, or cigarette in a motor vehicle, whether at rest or in motion, in which there is a minor. A violation of this section would be an infraction punishable by a fine not to exceed $100.

- Section 118949 HS was added to prohibit any law enforcement officer from stopping a vehicle for the sole purpose of determining whether the driver is in violation of Section 118948 HS.

- Section 12814.6 VC was amended to prohibit any law enforcement officer from stopping a vehicle for the sole purpose of determining if the driver is in violation of Section 118948 HS.

WHAT THIS MEANS TO LAW ENFORCEMENT: The provisions of this new law apply to motor vehicles, whether at rest or in motion. The law specifically states that officers shall not "stop" a vehicle to determine if the driver is in violation of the provisions. This brings up important enforcement issues. First, can officers stop a vehicle to determine if a passenger or other occupant is in violation of these provisions? Think about situations in which there is no driver in the vehicle: in a parking lot with the engine off, no keys in the ignition, etc. Second, since the law applies to vehicles that are at rest, can officers detain a driver or other occupant for these provisions when the vehicle is not moving? Technically, the law prohibits officers from "stopping" the vehicle. Clearly, the intent here is to make this law a secondary violation. However, the language of the law leaves enforcement ambiguous.

NOTES:

ELECTRIC PERSONAL ASSISTIVE MOBILITY DEVICE (EPAMD)

Vehicle Code Sections: 313, 467, 21280, 21281.5
Chapter 106 / Assembly Bill 470

SUMMARY: This new law amends the definition of an EPAMD to require an EPAMD to be no greater than 20 inches deep and 25 inches wide. This law also prohibits people from operating an EPAMD on a sidewalk, bike path, pathway, trail, bike lane, street, road, or highway at a speed greater than is reasonable and prudent and requires operators of EPAMDs to yield the right-of-way to all pedestrians on foot. Finally, this law deletes sunset provision language in specified sections regarding EPAMDs, thereby extending those provisions indefinitely.

HIGHLIGHTS:

- Section 313 of the Vehicle Code (VC) previously defined an EPAMD as the following:
  - Self balancing, non-tandem, two-wheeled device than can turn in place.
  - Designed to transport one person.
  - Electric propulsion system averaging less than 750 watts.
  - Maximum speed of less than 12.5 miles per hour.

This new law now also requires an EPAMD to be no greater than 20 inches deep and 25 inches wide.

- Section 21281.5 VC was added to prohibit a person from doing the following:
  - Section 21281.5(a) VC provides that a person shall not operate an EPAMD on a sidewalk, bike path, pathway, trail, bike lane, street, road, or highway at a speed greater than is reasonable and prudent having due regard for weather, visibility, pedestrians, and other conveyance traffic on, and the surface, width, and condition of, the sidewalk, bike path, pathway, trail, bike lane, street, road, or highway.
  - Section 21281.5(b) VC provides that a person shall not operate an EPAMD at a speed that endangers the safety of persons or property.
  - Section 21281.5(c) VC provides that a person shall not operate an EPAMD on a sidewalk, bike path, pathway, trail, bike lane, street, road, or highway with willful or wanton disregard for the safety of persons or property.
  - Section 21281.5(d) VC provides that a person operating an EPAMD on a sidewalk, bike path, pathway, trail, bike lane, street, road, or highway shall yield the right-of-way to all pedestrians on foot, including persons with disabilities using assistive devices and service animals that are close enough to constitute a hazard.

WHAT THIS MEANS TO LAW ENFORCEMENT:

Previously, there were no punitive Vehicle Code (VC) sections that dealt with EPAMDs. This bill provides law enforcement the ability to take enforcement action on people who operate EPAMDs in an unsafe manner uniformly throughout the state. Previously, local governments had to establish their own local ordinances for addressing EPAMDs.

NOTES:

BICYCLE ILLUMINATION

Vehicle Code Section: 21201
Chapter 232 / Assembly Bill 478

SUMMARY: This new law requires a person operating a bicycle during darkness to utilize specified illumination devices while riding upon a highway, a sidewalk, or a bikeway. These lighting requirements previously only applied to bicycles operated on "highways" during the hours of darkness.

HIGHLIGHTS:

Section 21201 of the Vehicle Code (VC) was amended to expand the lighting requirements applied to bicycles operated on any highway, *sidewalk, or bikeway*. It also allows the required white or yellow reflector, previously required on each pedal, to be worn on a shoe, or ankle as an option to the pedals.

Section 890.4 SHC defines bikeway, which is the definition used in this new law, as any way provided primarily for bicycle travel, including any class of bikeway such as a bike path, bike lane, or bike route.

NOTES:

VEHICLES: LICENSE PLATE COATING

Vehicle Code Sections: 5201, 5201.1
Chapter 273 / Assembly Bill 801

SUMMARY: This new law prohibits the use or sale of any product, such as spray coating, that impairs the reading or recognition of a license plate by an electronic device operated by state or local law enforcement or an electronic device operated in connection with a toll road, high-occupancy toll lane, toll bridge, or other toll facility.

HIGHLIGHTS:

Section 5201 of the Vehicle Code (VC) was amended to include any "product" to the list of prohibited items that may not be used to impair the recognition of a license plate. It also specifies that prohibited items cannot impair the reading or recognition of a license plate by an electronic device operated in connection with a toll road, high-occupancy toll lane, toll bridge or other toll facility, or operated by local or state law enforcement.

Section 5201.1 VC was added to prohibit a person from selling a product or device that would obscure, or is intended to obscure, the reading or recognition of a license plate. A conviction of this section would be punishable by a fine of $250 per item sold.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: The purpose of this bill is to stop the use of translucent, spray-on products applied to license plates that prevent the recognition of license plate numbers by cameras used at toll road gates and plazas. These products normally cannot be seen by patrol officers, making enforcement of use difficult.

NOTES:

AUTOMOBILE INSURANCE: PEACE OFFICERS

Insurance Code Section: 557.6
Chapter 211 / Senate Bill 629

SUMMARY: This new law repeals a provision in the Insurance Code that required a peace officer or firefighter who had been involved in a traffic collision to submit to his or her private automobile insurance provider a written declaration stating whether or not he or she was operating an authorized emergency vehicle while on-duty at the time of the collision.

HIGHLIGHTS:

- Section 557.6 IC previously required a peace officer or firefighter who has been involved in a traffic collision to submit to his or her private automobile insurance provider a written declaration stating whether or not he or she was operating an authorized emergency vehicle at the time of the collision.

- This bill repealed that section.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement officers no longer have to file a declaration with their private insurance company when involved in a traffic collision.

NOTES:

IMPOUND AUTHORITY: RECKLESS DRIVING AND EXHIBITION OF SPEED

Vehicle Code Section: 23109.2
Chapter 727 / Senate Bill 67

SUMMARY: This new law provides peace officers with the authority to impound a vehicle for 30 days when the person is engaged in reckless driving on a highway or any off-street parking facility, or when the driver engages in the exhibition of speed on any highway. This new law took effect on October 14, 2007. This expanded authority was provided to officers from January 1, 2003, through December 31, 2006, when this provision of the Vehicle Code was inadvertently allowed to sunset.

HIGHLIGHTS:

Section 23109.2 of the Vehicle Code (VC) is repealed and added to allow a peace officer to impound a vehicle for 30 days when the driver is engaged in any of the following:

- Reckless driving on a highway (Section 23103 (a) VC).
- Reckless driving in any off-street parking facility (Section 23103 (b) VC).
- Exhibition of speed on any highway (Section 23109 (c) VC).
- Speed Contest (Section 23109 (a) VC).

WHAT THIS MEANS TO LAW ENFORCEMENT:

The purpose of this bill was to reinstitute Section 23109.2 VC, specific to impounding vehicles involved in reckless driving or exhibition of speed, as it was written prior to the sunset date of January 1, 2007.

NOTES:

REMOVAL AUTHORITY: FRAUDULENT VEHICLE REGISTRATION

Vehicle Code Section: 22651
Chapter 453 / Senate Bill 1589

SUMMARY: This new law allows a peace officer to impound a vehicle that is found or operated upon a highway, any public lands, or off-street parking facility when that vehicle displays false evidence of registration.

HIGHLIGHTS:

This new law amends subdivision (o) of Section 22651 of the Vehicle Code (VC) to allow a peace officer to impound a vehicle that is found or operated upon a highway, any public lands, or off-street parking facility under the following conditions:

> (A) Displayed in, or upon, the vehicle, a registration card, identification card, temporary receipt, license plate, special plate, registration sticker, device issued pursuant to Section 4853 VC, or permit that was not issued for that vehicle, or is not otherwise lawfully used on that vehicle under this code.
>
> (B) Displayed in, or upon, the vehicle, an altered, forged, counterfeit, or falsified registration card, identification card, temporary receipt, license plate, special plate, registration sticker, device issued pursuant to Section 4853 VC, or permit.

NOTES:

CHANGES IN

FIREARMS

LAWS

FIREARMS: MICROSTAMPING

Penal Code Section 12126
Chapter 572 / Assembly Bill 1471

SUMMARY: This law will make it unlawful to manufacture, sell or transfer a semi-automatic handgun if it is not capable of micro stamping identifying characters on the expended cartridge. This law takes effect in 2010.

HIGHLIGHTS:

- Existing law defines unsafe handguns as failing to pass certain tests, or lacking certain features, as specified.
- This law, the Crime Gun Identification Act of 2007, would, commencing January 1, 2010, expand the definition of "unsafe handgun" to include semiautomatic pistols that are not designed and equipped with a microscopic array of characters that identify the make, model, and serial number of the pistol, etched in 2 or more places on the interior surface or internal working parts of the pistol, and that are transferred by imprinting on each cartridge case when the firearm is fired.
- Those provisions would be subject to specified certification procedures by the Department of Justice regarding the use of that technology.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: All semi-automatic handguns sold in the State in 2010 must be able to micro stamp information on the expended cartridge identifying the firearm is came from.

NOTES:

FIREARMS: PEACE OFFICER'S ADDRESS INFORMATION

Penal Code Section 12027
Chapter 139 / Assembly Bill 805

SUMMARY: Having an officer's address appear on an identification card or concealed weapons certificate is no longer required.

HIGHLIGHTS:

- Existing law authorizes certain peace officers to be licensed to carry concealed handguns, including specifying the format for the certificate evidencing the person's license.
- Existing law requires that the peace officer's address appear on the certificate.
- This bill would delete the requirement that the peace officer's address appear on the certificate.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Agencies may omit officer's address from identification cards and certificates authorizing the carrying of concealed weapons.

NOTES:

FIREARMS: EMERGENCY POWERS

Government Code Section 8571.5 (Added)
Chapter 715 / Assembly Bill 1645

SUMMARY: Lawfully carried firearms and ammunition may not be seized or confiscated during a declared state of emergency.

HIGHLIGHTS:

- Existing law authorizes the Governor to invoke various powers in the event of an emergency, as specified.
- This law would provide that these powers do not authorize the seizure or confiscation of any firearm or ammunition from any individual who is lawfully carrying or possessing the firearm or ammunition, as specified.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement may not seize or confiscate a firearm or ammunition carried lawfully during a state of emergency.

NOTES:

CASE

LAW

SUMMARIES

People v. Southard

(2007) 152 Cal.App.4th 1079

SUBJECT: Possession of Burglary Tools, per P.C. 466

RULE: Possession of burglary tools, per P.C. 466, is a "*general intent*" crime, and does not require proof of a specific intent to commit any particular burglary.

FACTS: Officer Eric Apperson of the Crescent City Police Department observed defendant's black Oldsmobile Achieva traveling at 35 to 40 miles per hour in a 25 mph residential speed zone at around noon, and, with lights and siren, gave chase. After a brief chase with speeds of up to nearly 50 mph, Apperson broke it off as being too dangerous. Based upon a description of defendant's vehicle broadcast by Officer Apperson, Officer Paul Arnett saw defendant's vehicle and, with his lights and siren, renewed the chase. Defendant, now doing an estimated 90 mph, pulled away from Officer Arnett and disappeared. However, defendant's abandoned car was soon found. He was arrested some 40 minutes later hiding in a nearby swamp. An inventory search of his impounded car resulted in the recovery of "a myriad of tools," including a steel pry bar, a crow bar, five pairs of pliers, a large pair of bolt cutters, a sledge hammer, an unspecified number of screwdrivers and hammers, and a tool box. There was also three walkie-talkies, two black sweatshirts, a strap-on head light, a flashlight, a ski mask, a pair of binoculars, a bundle of about 100 keys and an assortment of other, loose keys. Defendant was charged with felony evading, per V.C. 2800.2, and misdemeanor possession of burglary tools. At some point prior to trial, defendant called the local District Attorney's Office, talking to a chief deputy district attorney, and asked when he could have his "burglary tools back." At trial, this statement was admitted into evidence. Officer Arnett also testified that in his opinion, while none of the tools were illegal to possess, given the collection of such tools (and other items), they were likely possessed with the intent to commit burglaries. Officer Arnett also testified that a number of keys had recently been stolen from a city yard. Convicted of both counts, defendant appealed, challenging only the possession of burglary conviction.

HELD: The First District Court of Appeal affirmed. Penal Code section 466 provides that "every person having upon him or her in his or her possession (certain listed tools), or other instrument or tool with intent feloniously to break or enter into any building . . . is guilty of a misdemeanor." The offense is made up of three elements: (1) Defendant's possession, (2) of one or more of the type of tools within the purview of the section, and (3) the intent to use the tools for the felonious purpose of breaking or entering into a building. Defendant's argument on appeal was that there was no evidence of his "intent to use the tools" to commit a burglary. On appeal, the only question for the appellate court was whether there was "substantial evidence" supporting the jury's verdict. The Court ruled that there was. In response to defendant's argument that P.C. 466 is a "*specific intent*" crime (i.e., "with intent feloniously to break or enter into any building"), the court ruled that despite this language, section 466 is only a "*general intent*" crime. While it is necessary to show that the tools were possessed "with intent to feloniously break or enter into any building," there is no requirement that it be proved that any particular place was to be broken into, or that defendant had any special purpose in mind, or that the tools were to be used in any definite manner. "(I)t was sufficient to allege such possession with the guilty intent, without further specific averment. The offence was complete when the tools were procured with a design to use them for a burglarious purpose." It is not necessary to prove a specific intent to burglarize any particular structure. In this case, there was substantial evidence of defendant's "burglarious purpose" in possessing these tools. Specifically, defendant took "extreme

measures" to avoid arrest, reflecting some measure of a "consciousness of guilt." It is also relevant that defendant was driving around with all these tools in his car instead of keeping them in a workshop or garage somewhere. Also, defendant himself referred to the tools as "burglary tools" when he called the DA's Office, asking for their return. Officer Arnett testified that in his experience, possessing so many of these types of tools was indicative of an intent to commit burglaries. Lastly, the large number keys, with evidence that the City had recently lost some keys by theft, tended to support a general intent to commit burglaries. Defendant was therefore properly convicted of possessing burglary tools.

NOTE: Interpreting P.C. 466 as a general intent crime greatly expands the reach of this section making it applicable almost anytime you catch a person with tools in his possession under suspicious circumstances. It might help to think of this Penal Code provision as a "generalized, specific intent" crime. And while it is only a misdemeanor, this section is a great tool (no pun intended) for law enforcement, justifying at least a detention and an investigation into a person's suspicious activities.

NOTES:

People v. Kelly

(2007) 154 Cal.App.4th 961

SUBJECT: Possession of Burglary Tools, per P.C. 466

RULE: A box cutter and slingshot, with evidence tending to indicate that they are possessed for the purpose of committing vehicle burglaries, are burglary tools per P.C. 466 even though not specifically listed in the section.

FACTS: Defendant, already on probation for receiving stolen property in a case where a charge of vehicle burglary was dismissed as a part of a plea bargain, was observed by San Francisco Police Department Inspector Mark Gamble in the vicinity of a reported vehicle burglary in progress. Defendant matched the description of the suspect reported to have broken into a white van which Inspector Gamble found with a shattered rear passenger window. When defendant saw Inspector Gamble driving up in a marked patrol vehicle, he quickly looked away, made a sharp right turn, and walked in the opposite direction. Inspector Gamble detained defendant. Defendant had two cell phones, at least one of which was stolen, in his hands when contacted. He was carrying a backpack which contained clothing that matched the description originally telephoned into the police dispatcher. In addition to the cell phones, he was found to be in possession of some other items later determined to have been taken from the white van. He also had in his backpack a box cutter, a slingshot, and a flashlight. Inspector Gamble, with experience investigating vehicle burglaries, opined that these items qualified as burglary tools. A slingshot, per Inspector Gamble, was used with ceramic chips to break an automobile window; a technique that "will crack the glass usually on the first hit." The box cutters are used to cut the wires on car stereos. Flashlights are used to see inside the dark interior of a car. A probation revocation hearing was held where it was alleged that defendant had committed a vehicle burglary and was in possession of stolen property and burglary tools. Because the victims were not subpoenaed in, the Court declined to consider evidence of the vehicle burglary and the possession of stolen property. However, with Inspector Gamble's testimony, the Court found that defendant was in possession of burglary tools. Defendant appealed.

HELD: The First District Court of Appeal (Div. 3) affirmed. Penal Code 466, describing the misdemeanor crime of being in possession of burglary tools, lists various tools commonly used to commit burglaries. The section *does not* mention slingshots, box cutters or flashlights. The section does provide, however, that in addition to the tools specifically listed, any "other instrument or tool" can be a burglary tool so long as possessed "with intent to feloniously break or enter into any . . . vehicle . . . ." The Court discussed the prior case of *People v. Gordon* (2001) 90 Cal.App.4th 1409, which had held that under a rule known as "*ejusdem generis*," tools not listed cannot be burglary tools unless they are at least similar to those that are listed. P.C. 466 specifically lists "a picklock, crow, keybit, crowbar, screwdriver, vise grip pliers, water-pump pliers, slidehammer, slim jim, tension bar, lock pick gun, tubular lock pick, floor-safe puller, master key, ceramic or porcelain spark plug chips or pieces." Under the rule of "*ejusdem generis*," a slingshot and a box cutter likely could not be burglary tools. This Court, however, criticized, and chose to ignore, the *Gordon* Court's holding when it used the rule of "*ejusdem generis*" to restrict what tools could be included under "other instrument or tool." The circumstances of this case clearly showed that defendant possessed the slingshot and the box cutters with the intent to commit vehicle burglaries. Such items, therefore, are burglary tools.

NOTE: *Gordon*, which dealt with whether ceramic sparkplug chips could be burglary tools, was much criticized when it was decided in 2001. Shortly after it was published, the Legislature reacted by amending section 466 to specifically include sparkplug chips, as noted above. This Court points out that the rule of "*ejusdem generic*," as a "rule of construction," is supposed to be used to help interpret the intent of the

Legislature, not thwart it. The obvious legislative intent was to include any item or object that is possessed with the intent to assist in the commission of burglaries. The Court here, however, specifically declined to decide whether defendant's flashlight was an "other instrument or tool" under the section. Note that you can't go charging anyone and everyone in possession of box cutters, slingshots, or flashlights, with being in possession of burglary tools. You need proof that your crook possessed them with the intent to do burglaries. This particular defendant, in addition to having just committed a vehicle burglary, also had a criminal history for similar crimes.

NOTES:

People v. Arnold

(2006) 145 Cal.App.4th 1408

SUBJECT: Felon in Possession of a Firearm; Definition of Firearm

RULE: The "bare metal part or the barrel of" a firearm is sufficient to be a "firearm" for purposes of charging Penal Code 12021 (felon in possession of a firearm).

FACTS: Yolo County Sheriff's Detectives, investigating a stolen all-terrain vehicle (ATV) report, lawfully searched defendant's rural property. In doing so, they found the remnants of a Model 77 Ruger .22-caliber rifle in a barn. All that was recovered was the barrel of the rifle, which included the chamber area and the part of the firearm where the mechanics of the gun were housed with the bolt still inside it. The front stock support arm and the rear stock, helpful in holding and aiming the firearm, were apparently burned away in a fire. A shell could be inserted and the bolt closed behind it. But the safety would not slide up into position. Defendant, a convicted felon still on probation, told the detectives that he found the remains of the rifle in a burned-out barn some 14 years earlier. Defendant was also found to be in possession of the ATV stolen from a neighbor. Convicted of auto theft [Vehicle Code 10851(a)], possession of a firearm by a convicted felon [Penal Code 12021(a)(1)], and receiving stolen property [Penal Code 496(a)], defendant appealed, arguing that the evidence was insufficient to prove that he possessed a firearm.

HELD: The Third District Court of Appeal affirmed. The issue was whether there was enough left of the rifle to legally constitute a "firearm" for purposes of Penal Code 12021. The Court ruled that there was. Subdivision (a) of section12021 makes it illegal for a convicted felon to own, purchase, receive, or have in his or her possession or under his or her custody or control any firearm. Subdivision (b) of Penal Code 12001 defines a "firearm" as "any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion." Subdivision (c) of section 12001 notes that for purposes of section 12021 (and a number of other sections) a "'firearm' *includes* the frame or receiver of the weapon." [Italics added.] Citing other references, the Court noted that a "receiver" is "the metal frame in which the action of a firearm is fitted and to which the breech end of the barrel is attached." The "action" to a firearm is "an operating mechanism," or "the manner in which a mechanism . . . operates." Although prior case law has held that the firearm need not even be operable, defendant argued that subdivision (c) requires that there be at least a "frame" or a "receiver" to be a firearm, and that there was not enough left of the gun in this case to constitute a "frame" or "receiver." The Court held, however, that the Legislature did not intend that you must have either a frame or a receiver. While having either a frame or a receiver by itself would clearly constitute a "firearm" for purposes of section 12021, when the Legislature used the term "*includes*" in section 12001(c), i.e. "a firearm *includes* the frame or receiver of the weapon", it did not mean to imply that a weapon was not a firearm just because you are missing both of these parts. Having no more than the barrel of a firearm is enough. In this case, just about all that was left of the gun was "the bare metal part or the barrel of the weapon." In other words, possession of a frame or a receiver is <u>sufficient</u> to establish a violation of section 12021, but it is not <u>necessary</u>. Defendant, therefore, was properly convicted of being a felon in possession of a firearm.

NOTE: This case gives a very broad definition to "firearm." The other sections, by the way, to which section 12001(c) applies are Penal Code §§ 12021.1 (persons convicted of "violent" felonies in possession), 12070, 12071, 12072, 12073, 12078 (firearm licensing requirements), 12101 (juveniles in possession), and 12801 (handgun safety certificate requirements), as well as Welfare & Institutions Code §§ 8100, 8101, and 8103 (mental patients and firearms).

NOTES:

People v. Foster

(2007) 155 Cal.App.4th 331

SUBJECT: Traffic Stops; Prolonged Detentions

RULE: Threats to a crime victim (or witness), per P.C. 136.1, may be conveyed through a third party. However, it is not legally required that the victim ever even be told of the threats.

FACTS: Defendant and his girlfriend, Genevieve S., got into an argument that resulted in defendant hitting her in the mouth with a flashlight. The resulting injury required medical treatment at a hospital. Defendant was arrested. From jail, defendant made a number of telephone calls to a mutual friend, Gladys Buchanan. In the first call, defendant told Buchanan that he and Genevieve had been in a fight and "hurt each other," requiring both of them to get hospital treatment (one of four different versions of the fight that defendant would eventually use). In a second call, he told Buchanan that Genevieve got him into a lot of trouble; that she did not remember that she got injured when she was attacked by two women at a park, and that defendant had seen Genevieve in court and "that's not a good idea." He asked Buchanan to give Genevieve "a message" and tell her "not to tell" on him. He gave Buchanan a telephone number where she could call Genevieve. He told her to tell Genevieve that he was "in big trouble here." He also told Buchanan to tell Genevieve that it would be bad for her to testify because "that's gonna look bad on her cause she's takin the psych meds and she was drunk and she don't know what happened." In a later telephone call, defendant told Buchanan; "I hope she don't show up to none of the courts . . . because she's going to get into trouble," and that she would be arrested, and that "it's not good for her" to testify. Buchanan told defendant she would pass on the message. However, she did not. All these conversations were recorded by jail personnel and later played for the jury in defendant's subsequent trial. Defendant was convicted of a felony violation of attempting to dissuade a witness, per P.C. 136.1(a)(2), among other charges. He appealed.

HELD: The Second District Court of Appeal (Div. 6) affirmed. With defendant arguing that it cannot legally be an "*attempt*" to dissuade a witness from testifying, per P.C. 136.1, when he never talked to the witness/victim himself, the issue here was what it takes to constitute a violation of this section. The Court found that to be a violation of section 136.1, the prosecution needs only to prove that defendant "[k]knowingly and maliciously" attempted "to prevent or dissuade any witness or victim from attending or giving testimony at any trial . . . ." The prosecution must present evidence that defendant's acts or statements (were) intended to affect or influence a potential witness's or victim's testimony or acts . . . ." With proof of such an intent, the People must then prove that defendant's act or acts went "beyond mere preparation" and "show that the perpetrator is putting his or her plan into action." There is no restriction on the means the defendant uses to communicate his threat, nor that he deliver the message to the witness himself. There is also no requirement that the victim or witness is actually deterred, or that the message is ever even delivered her. "(I)t is immaterial that for some collateral reason he could not complete the intended crime." The Court also rejected defendant's argument that at worst, his acts constituted no more than a solicitation to commit a crime. With his plan "clearly shown, slight acts done in furtherance of that (plan) will constitute an attempt." There is no legal requirement that defendant's acts "be the ultimate step toward the consummation of the design; it is sufficient if it is the first [one]." With these principles in mind, the Court found that defendant's acts clearly constituted a completed attempt to dissuade Genevieve from testifying against him. He dictated to Buchanan how Genevieve would be dissuaded by (1) giving her instructions on how to contact Genevieve, (2) telling Buchanan what to say to her, and (3) obtaining

Buchanan's assurance that the message would be passed on. "Apparent possibility" of completion is all that is necessary to constitute an attempt. That standard was met here.

NOTES:

People v. Plengsangtip

(2007) 148 Cal.App.4th 825

SUBJECT: Accessory After the Fact, Per P.C. 32

RULE: Affirmative (as opposed to passive) lies to a police officer may, in some circumstances, be a violation of P.C. 32; Accessory After the Fact.

FACTS: Kim Mektrakarn, a Thai national, owned a food processing business in Ontario, California, in 1996. Defendant, who was also from Thailand, was a friend of Mektrakarn's. The victim, Luis Garcia, worked for Mektrakarn. In October, 1996, Garcia threatened to report Mektrakarn to the state labor commission for failing to pay his employees overtime unless Mektrakarn agreed to give Garcia $5,000. Mektrakarn agreed to the blackmail. On November 23, 1996, Garcia was to meet Mektrakarn at Mektrakarn's place of business to receive a partial payment of $3,000. Defendant was present during the meeting. Garcia was never seen nor heard from again following this meeting. Mektrakarn fled to Thailand shortly thereafter. A murder investigation ensued with evidence (e.g., blood stained carpet, clothing being burnt and discarded in the trash, Garcia's car being seen at the scene and then later found abandoned elsewhere, a van rented by Mektrakarn, smelling of bleach when later found in Las Vegas) being developed indicating that Mektrakarn had murdered Garcia in his office. However, no charges were filed. Eight years later, with the advent of DNA, the investigation was begun anew. It was determined through DNA analysis that the blood recovered from Mektrakarn's office was Garcia's. Defendant was interviewed at this time. He admitted to investigators that he had been in Mektrakarn's office on the afternoon of Garcia's disappearance, but claimed that he never saw Garcia there, that Mektrakarn was in and out of his office as though conducting business as usual, that he did not see Mektrakarn murder Garcia, and that nothing unusual happened. Defendant's statement conflicted with the physical evidence and eyewitness accounts. As a result of this interview, defendant was charged with being an "accessory after the fact" to a murder, for having "harbor(ed), conceal(ed) or aid(ed) a principal in such felony with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment . . . ." (P.C. 32). After being held to answer on this charge following a preliminary examination, a superior court judge granted defendant's motion to dismiss (per P.C. 995), ruling that merely denying any knowledge about an alleged felony is legally insufficient to constitute being an accessory after the fact. The People appealed.

HELD: The Fourth District Court of Appeal (Div. 2) reserved. The criminal offense of being an "*accessory after the fact*," per P.C. 32, consists of the following elements: (1) Someone (i.e., a "principal," other than the defendant) has committed a specific, completed felony; (2) the defendant harbored, concealed, or aided the principal; (3) with the knowledge that the principal committed the felony or has been charged or convicted of the felony; and (4) the defendant had the specific intent that the principal avoid or escape from arrest, trial, conviction, or punishment. Prior case law has established that certain lies, or "*affirmative falsehoods*," made to authorities, if made with the requisite knowledge and intent, may constitute the aid or concealment contemplated by P.C. 32. On the other hand, one who does no more than "passively" fail to reveal a known felony, refuse to give information to authorities, or deny any knowledge of a felony when motivated by self-interest, *cannot* be guilty of being an accessory. Falsely claiming not to know anything about a crime is nothing more than a "passive" refusal to reveal information, and not a violation of P.C. 32. In this case, however the preliminary hearing magistrate reasonably concluded that Mektrakarn murdered Garcia in his office in November, 1996, that defendant was present at that time, and that defendant affirmatively lied to investigators when he told them that he had not seen Garcia that day, that nothing

unusual had happened, and, more to the point, that Mektrakarn did not murder Garcia. The superior court judge erred in his conclusion that defendant's lies under these circumstances did not constitute an "*affirmative falsehood*." "A statement that a person was not involved in the commission of a crime, if false, is an affirmative falsehood." The charge of being an "*accessory after the fact*," therefore, was reinstated.

NOTE: There is a thin line between "passive" and "affirmative" lies. Denying any knowledge of a crime, or otherwise refusing to cooperate, is the former, and not illegal. But falsely providing an alibi for someone is the latter, and, if the other elements of P.C. 32 can be proved, a crime.

NOTES:

In re Jesus O

(2007) 40 Cal.4th 859

SUBJECT: Grand Theft Person, per P.C. 487(c)

RULE: Taking property belonging to an assault victim, such property having been involuntarily dropped by the victim during, and as a result of, the assault, so long as the defendant has an intent to steal when the assault occurs, is a grand theft from the person.

FACTS: Defendant and Roberto A. followed Mario H. and three other male juvenile companions from a Van Nuys McDonalds restaurant into an alley and confronted them, announcing their gang affiliation ("*Assassin Kings*"), and asking them for their money. Defendant then "sucker punched" one of Mario's companions in the mouth, and the fight was on. Mario and his compatriots fled when Roberto pulled out a knife and threatened to "shank" him. Escaping over a fence, Mario quickly discovered that his cell phone was missing. One of Mario's friends saw Roberto pick it up off the ground and put it into his pocket. Defendant (and separately, Roberto) was later arrested and charged by petition in Juvenile Court with robbery (P.C. §211) and grand theft person, per P.C. 487(c). A Juvenile Court judge sustained the petition on one count of grand theft from the person and attempted second degree robbery. Defendant appealed. The Second District Court of Appeal affirmed, but reduced the grand theft to a petty theft, ruling that the property (worth less than $400) was not taken from Mario's person as required by subdivision (c) of P.C. 487. The State petitioned to the California Supreme Court.

HELD: The California Supreme Court, in a split 6-to-1 decision, reversed the District Court of Appeal (thus affirming the trial court), finding the evidence sufficient to be a completed "*grand theft person*." Grand theft from the person, pursuant to subdivision (c) of P.C. 487, requires proof that "the property is taken from the person of another." The issues here are (1) whether Mario's cell phone was "on his person" for purposes of the grand theft statute at the time of the "taking," and (2) whether it makes a difference that it was on his person when the assault first began, even if it was not on his person by the time the thief took physical possession of it. To answer these questions, the Court reviewed prior case decisions dating all the way back to 1897 when it was first held that to be a "*grand theft person*," the property taken has to have been "actually upon or attached to the (victim), or carried or held in actual physical possession" at the time of the taking. (*People v. McElroy* (1897) 116 Cal. 583.) Cases since then have struggled with what this means. In reviewing these cases, the Court noted the developing theory that the "*taking*" element itself can extend over a period of time. In this case, defendant exhibited an intent to steal when he and Roberto first confronted Mario, claiming gang membership and asking him whether he had any money. Under these circumstances, it was evident that they intended to take whatever money Mario might have had on him. With this intent, defendant and Roberto assaulted Mario and his companions. The initiation of the assault, per the Supreme Court, when Mario still had his cell phone on him, comprised the beginning of the "taking." It was this assault that caused Mario to be separated from his cell phone. When Roberto later picked the cell phone up off the ground, the "taking" element of a grand theft from the person was complete. The initial part of the "taking," therefore, having occurred when the property was still on Mario's person, makes this crime a completed grand theft from the person. Also, the Court held that it is not relevant that the property defendant originally intended to take (i.e., money) is not the same property he and Roberto eventually did take (i.e., the cell phone). The Appellate Court, therefore, erred in reducing the crime to a petty (i.e., *not* from the person) theft.

NOTES:

People v. Krohn

(2007) 149 Cal.App.4th 1294

SUBJECT: "Public Place," according to a Local Ordinance

RULE: The gated courtyard of an apartment complex is not a "*public place*" unless the general public can expect to access the area "without challenge."

FACTS: A Tustin police officer conducting an investigation (on something unrelated to this case) used his "emergency access key" to gain entry to the "private parking area" of a gated two-story apartment complex. The access key opened an electric gate that blocked the driveway leading into the parking area. The gate, complete with spikes on top, automatically shut behind the officer. The front entryway to the apartment complex was also guarded by a tall, metal fence with similar spikes along the top. The fence included a locked gate that required a key or code to open. Because this front gate would automatically lock if closed, the tenants commonly left it propped open. It was unknown whether the gate was open or closed on this occasion. While in the parking lot, the officer noticed defendant coming down a flight of stairs into the ground floor courtyard area, toward a rear gate and the parking area. Defendant was carrying a bag of trash and a beer can. Tustin has a local ordinance making it "unlawful for any person to drink any alcoholic beverage on any . . . *public place* . . . in the City . . . ." (Italics added) Defendant was detained for violating the ordinance—*drinking in public*—and asked if he had any weapons or drugs on him. Defendant agreed to a consensual search while admitting to having drugs in his pocket. Marijuana, methamphetamine and Vicodin pills were found on his person. Charged with possessing these drugs, defendant's motion to suppress the evidence was denied. He appealed from his two-year prison sentence.

HELD: The Fourth District Court of Appeal (Div. 3) reversed. The issue on appeal was whether defendant was in a "*public place*" at the time he was caught with the beer can, "*public place*" being a necessary element of the Tustin ordinance. The test is whether the area in issue is "readily accessible to all those who wish to go there." A place is generally considered "*public*" if "a member of the public can access the place 'without challenge.'" Therefore, even though one's front yard, for instance, is private property, it is a "*public place*" if the general public can be expected to walk across it to gain access to the residence's front door. That same front yard, however, would *not* be a public place if it were blocked off by a 3½ foot fence and had three dogs in the yard, as occurred in *People v. White* (1991) 227 Cal.App.3d 886. This is because under these circumstances, it would have "provided challenge to public access." As noted in *White*, this is true even if the gate is unlocked. In the instance case, the Court held that "(t)he fences and gates certainly 'challenge' the public's access to the courtyard" where defendant was detained. The fact that the front gate is periodically propped open is irrelevant, at least in the absence of any evidence that it was open at the time in question. Defendant, therefore, was not in a public place. Not being in violation of Tustin's ordinance, defendant was unlawfully detained. As such, his admissions and consent to search were the products of that unlawful detention. The evidence should have been suppressed.

NOTE: What is, and what is not, a "*public place*" will differ depending upon the specific statute being interpreted. Here, the Court cites a number of P.C. 647(f) (drunk in public) cases. It seems pretty evident that the locked-off gated area of a residential complex is not a public place for purposes of P.C. 647(f), or this local ordinance.

NOTES:

Blankenhorn v. City of Orange

(9th Cir. 2007) 485 F.3d 463

SUBJECT: Trespassing on Commercial Property

RULE: An arrest for trespassing in a shopping mall upheld in this case.

FACTS: In February, 2001, Gary Blankenhorn, a "known 18th Street gang member, caused some sort of disruption at "The Block," a shopping mall in the City of Orange, and was ejected by security guards. He was issued a written "Notice Forbidding Trespass" which informed him that if he returned he would be prosecuted for trespassing. Orange Police Department Sgt. Jeff Gray was present when Blankenhorn was ejected. Almost six months later, Sgt. Gray observed Blankenhorn at the mall and remembered that he'd been ejected some months earlier. He and another officer contacted Blankenhorn so they "could talk to him, identify him and determine whether The Block security wished to have him removed or take some other action." In attempting to detain Blankenhorn, the suspected offense being trespassing per P.C. 602(j) (now, (k)), he became uncooperative and tried to leave. Although the sequence and nature of the events was the subject of some dispute, it was at least agreed that a physically resisting Blankenhorn was eventually subdued and arrested by the officers with the assistance of a security guard. After a struggle, the officers eventually handcuffed him and "secured his wrists and ankles with ripp-hobble restraints." Charged in state court with one count of misdemeanor trespass per P.C. 602(n) (now, (o)), three counts of resisting arrest, and one count of disturbing the peace (everything but the trespass being charged as felonies through the addition of a gang-related enhancement per P.C. 186.22(d)), a preliminary hearing was held. After the preliminary hearing, however, the Orange County District Attorney dismissed the entire case against Blankenhorn, citing witness credibility issues as the reason. But by that time, Blankenhorn had already been in jail for three months. Blankenhorn sued the involved officers in federal court for false arrest, excessive force, and malicious prosecution. The federal district court granted the officers' motion for summary judgment, dismissing the civil suit. Blankenhorn appealed.

HELD: The Ninth Circuit Court of Appeals affirmed, with a majority (2-to-1) of the Court finding that the officers had probable cause to arrest Blankenhorn, *but barely*. (The Court reversed on the issue of whether the officers had used excessive force, finding enough of a conflict in the evidence to submit that issue to a jury.) In California, "an officer has probable cause for a warrantless arrest 'if the facts known to him would lead a [person] of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime." The issue here is whether the officers had probable cause to arrest Blankenhorn for trespassing (all other charges being dependent upon the legality of the trespass arrest). Blankenhorn had been forbidden from entering The Block some six months before. He knew that he was banned from the mall. The officers, in arresting him, charged him with P.C. 602(j) (now, (k)). On the state court criminal complaint, the charge was changed to P.C. 602(n) (now, (o)). So long as either trespass charge (or any other) applies, the arrest was lawful. P.C. 602(j) requires that there be probable cause to believe that defendant was on the mall's property (1) "for the purpose of injuring any property or property rights or (2) with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of the land, the owner's agent or by the person in lawful possession. The Court here found that the officers were reasonable in believing that a known gang member who had been banned from the mall could have returned for either such purpose or intention. Also, P.C. 602(n) (now (o)) makes it a trespass to refuse or fail to leave land, real property, or structures occupied by another and not open to the general public, upon being requested to leave by (1) a peace officer at the request of the owner, the owner's agent, or the person in lawful possession, . . . or (2) (by) the owner, the owner's agent,

or the person in lawful possession." The Court here read the "Notice Forbidding Trespass," given to some six months earlier as his request to leave. And with that notice, the mall was no longer "open to the general public," at least as far as defendant was concerned. Perhaps recognizing the weaknesses in the arguments for applying either of these trespass sections to Blankenhorn's situation (i.e., "(I)t appears an actual conviction for trespass might have been difficult without additional evidence."), the Court noted that "probable cause" is a far easier standard to satisfy than that of "beyond a reasonable doubt." As noted by the Court: "Ultimately, . . . our inquiry is not whether Blankenhorn *was* trespassing. Rather, it is whether a reasonable officer had probable cause to think he could have been." Therefore, despite the unlikelihood of ever obtaining a conviction, the officers still had sufficient evidence to satisfy the requirements of a lawful arrest. And even if not, the legal issues involved are so unsettled that the officers were entitled to qualified immunity from civil liability.

NOTE: Don't use this case decision as authority for using 602(k) or (o) again in any situation similar to those in this case.

NOTES:

Edgerly v. City and County of San Francisco

9th Cir. 2007) 495 F.3d 645

SUBJECT: Trespass on Private Property

RULE: Being on another's property without permission, even when gated and posted with "No Trespass" signs, is not a criminal offense under California's trespass statutes.

FACTS: Two San Francisco Police Department officers on routine patrol observed Erris Edgerly standing inside the gated area of the Martin Luther King/Marcus Garvey Housing Cooperative, next to a playground area. "No Trespassing" signs were posted at the Cooperative's gated entrances. About five minutes later, the officers noticed that Edgerly was still there. The officers recognized defendant, knew that he didn't live at the Cooperative, and knew that he had been previously arrested for a drug offense at a nearby street corner. The officers also knew that the area was considered to be a "high-crime" area and that Edgerly was an "associate" of neighborhood gang members. When asked what he was doing there, Edgerly told the officers that he was "just chilling." Determining that Edgerly was on the grounds of the Cooperative for no specific reason, and because the Cooperative's management had requested that the officers enforce the "No Trespassing" signs, they arrested him for trespassing per *P.C. § 602(l)* (now *602(m)*). Edgerly was patted down for weapons and transported to the station where a more thorough search was conducted. (Edgerly later testified that he was subjected to a body cavity search.) He was cited for trespass and released. No criminal charges were ever filed. Edgerly sued the officers and everyone up the chain in state court (the suit later being transferred to federal court) for illegally arresting and searching him. The civil suit was eventually dismissed, the trial court ruling that if not section *602(l)*, Edgerly must have violated a trespass of "*some sort*." Edgerly appealed.

HELD: The Ninth Circuit Court of Appeals reserved, holding that "*as a matter of law*," the officers did not have probable cause to arrest defendant and thus violated the Fourth Amendment in doing so. If it was objectively reasonable for the officers to arrest Edgerly on "*some sort*" of trespass, or loitering, statute, the arrest would have been lawful, even if the officers did not use the proper code section. The Court considered, one by one, the available trespass statutes. *P.C. § 602(l)* (now *(m)*): This section requires proof that a person "willfully . . . [e]nter[s] and occupie[ies] real property or structures of any kind without the consent of the owner." The California Supreme Court has previously held that this section only applies where the "entering and occupying" is a "nontransient, continuous type of possession," and where the trespasser had the "specific intent to remain permanently, or until ousted." (E.g., a "squatter.") There was no evidence that this is what Edgerly had intended to do. *P.C. § 647(h)*: This loitering section requires that the alleged loiterer "delay or linger" on the property "for the purpose of committing a crime as opportunity may be discovered." There was no evidence that Edgerly was planning to commit some crime on the grounds of the Cooperative. *P.C. § 602.5*: This trespass statute is limited to one who enters, or refuses to leave, a "noncommercial dwelling house, apartment, or some such place;" i.e., "*places of habitation*." No dwelling was entered in this case. *P.C. § 602.8(a)*: This section prohibits the entering, without written permission, "lands under cultivation or enclosed by fence . . . [or] uncultivated or unenclosed lands where signs forbidding trespass are displayed at intervals not less than three to a mile." First, the Court had to question whether this section applies to residential property, there being some prior authority indicating that it does not. Second, the offense is only an infraction (for the first offense) and does not justify a custodial arrest. Therefore, there being no criminal offenses that are applicable to what defendant was doing at the time he was arrested, taking him into custody violated the Fourth Amendment. The Court further held that

these officers should have known this, and were therefore not entitled to even qualified immunity from civil liability.

NOTE: Calling a "trespass" a "trespass" doesn't necessarily make it a "trespass." Again, the problem is that there is a big difference between a *criminal trespass* (as defined by one or more California criminal statutes) and a *civil trespass* (which is probably what Edgerly was doing in this case). Don't make the mistake of confusing a property owner's right to civilly enjoin someone from going onto his property with your right to arrest the "trespasser;" you need a specific statute with all the elements covered by whatever it is your arrestee is doing. If you are considering using "prowling" – *PC §647(h*) you need to articulate why you believe the arrestee was loitering for the purpose of committing a crime (like drug dealing) as opportunity may be discovered. There is no such thing as the offense of "P.C. § 602, Trespass." It has to be "P.C. § 602, '*subdivision something*'" (or some similar statute) to be a criminal trespass.

NOTES:

People v. Wright

(2006) 40 Cal.4th 81

SUBJECT: Medical Marijuana (Transportation of)

RULE: A defendant can raise a medical marijuana defense to transportation of marijuana.

FACTS: Officers stopped the defendant as he drove his truck from a carwash after receiving a tip that a backpack in the truck reeked of marijuana. After one officer noticed a backpack inside the car and smelled a strong odor of marijuana wafting from the truck, the officer asked about the marijuana but the defendant claimed there was none in the truck. The officer had the defendant step outside the truck and another officer patted down the defendant. During the patdown, the officer located a baggie of marijuana in defendant's front pocket. The other officer searched the backpack and found eight more baggies of marijuana inside (six weighing between 4.8 to 9.7 grams and two weighing slightly more than ounce each) and an electronic scale. A search of the truck revealed another pound of marijuana in the backseat. Defendant was charged with the sale and transportation of marijuana (respectively, H&S Code §§ 11360 and 11359). At trial, the defendant argued he was entitled to raise a medical marijuana defense to the charges that his transportation and possession of marijuana since he received a doctor's recommendation allowing him to use marijuana, the recommendation approved the use of one pound of marijuana every two or three months (the defendant claimed he needed to eat marijuana to deal with his particular ailment) and the marijuana was intended for his personal use. The trial court ruled the defense could not be raised as to the transportation count or the possess sales count but said the defense could present evidence of medical use as proof that defendant possessed the marijuana for personal medical use and not to sell it. After defendant was convicted, he argued on appeal he was entitled to raise a defense provided for in the current "medical" marijuana laws to the transportation charge.

HELD: The "Compassionate Use Act" added section 11362.5 to the Health and Safety Code. That section provides a defense in court to prosecution for possession of marijuana (H&S Code 11357) and cultivation of marijuana (H&S Code 11358) if persons charged with those offenses possess or cultivate marijuana for personal medical purposes and they have a written or oral recommendation or approval of a physician (i.e., a "patient") or if they are a "primary caregiver" for such a patient . The legislature expanded the defense when it added sections 11362.7 through 11362.9 to the Health and Safety Code so that it can apply to charges of possession for sale of marijuana (H&S Code 11359), transportation of marijuana (H&S Code 11360), maintaining a place for the sale, giving away or use of marijuana (H&S Code 11366) and making available premises for the manufacture, storage or distribution of controlled substances (H&S Code 11366.5). The court recognized that Health and Safety Code section 11362.77(a) generally provides that a qualified patient is limited to no more than eight ounces of dried marijuana and no more than six mature or 12 immature marijuana plants. However, the court went on to point out that section 11362.77(b) provides that a qualified patient may possess a greater amount if a doctor recommends that a greater amount is required for the patient's medical needs. Thus, the defendant should have been allowed to raise the expanded "medical marijuana" defense to the offense of transporting marijuana as well as to the charge of possession for sale of marijuana even though the doctor had not actually approved the defendant's use of marijuana in a greater amount than the state guidelines until after the arrest (although the doctor had approved defendant's use *in general* before the arrest). However, the error in refusing to allow the expanded defense was harmless error because even

if the defendant had been allowed to raise the expanded defense, the jury would still have found him guilty beyond a reasonable doubt under the facts of the case.

NOTES:

People v. Strasburg

(2007) 148 Cal.App.4th 1052

SUBJECT: Proposition 215; Medical Marijuana

RULE: An officer's probable cause to believe that a person is in illegal possession of marijuana is not diminished just because the person produces a medical marijuana identification card or a physician's authorization.

FACTS: Napa County Deputy Sheriff Aaron Mosely observed defendant and another person sitting in a vehicle in a gas station parking lot. The deputy parked his patrol unit and walked up to defendant's vehicle, immediately detecting the odor of burning marijuana. Upon making contact, defendant admitted that he had been smoking marijuana but claimed that he had a medical marijuana card allowing him to do so. Ignoring this comment, the deputy asked defendant if he had marijuana in the car. Defendant handed him a baggie containing ¾ of an ounce of marijuana. A second baggie containing 2.2 grams of marijuana was observed in plain sight as defendant, at the deputy's request, stepped out of his car. Defendant told the officer again that he had a medical marijuana card and asked him to look at it. The deputy refused, telling defendant, "We don't buy that here in Napa Valley." Putting the then-detained defendant in the back seat of his patrol car, the deputy asked if there was any more marijuana in the car. Defendant admitted that there was. A full search of the car was conducted with 23 more ounces of marijuana being found along with a scale. Defendant was arrested. After a motion to suppress the marijuana was denied, he pled guilty and appealed.

HELD: The First District Court of Appeals affirmed. Defendant's argument on appeal was that once he attempted to produce a medical marijuana card (which, as it turned out, was apparently only a physician's authorization to use marijuana and not the "identification card" provided for in Health and Safety Code section 11362.7(g)), the deputy had no legal cause to detain him or search his car. The Court rejected this argument. On November 5, 1996, the voters approved by initiative California's "Compassionate Use Act of 1996" (i.e., Proposition 215, Health & Saf. Code, 11362.5). Then, in 2003, the Legislature enacted Health and Safety Code sections 11362.7 et seq., providing for a voluntary program for the issuance of a medical marijuana identification card by the State Department of Health Services. Under the terms of these new sections, defendant, as a "qualified patient" (for which an identification card is not necessary; Health & Saf. Code, 11362.7(f)), was permitted to possess up to no more than eight ounces of dried marijuana. (Health & Saf. Code, 11362.77(a)) Defendant argued that at that point when he was detained and his car searched, Deputy Mosely only knew that defendant possessed just over ¾ of an ounce of marijuana and had no reason to believe that he possessed it unlawfully. However, the California Supreme Court has previously noted that the medical marijuana provisions do not confer a complete immunity from prosecution. (People v. Mower (2002) 28 Cal.4th) A qualified patient may raise the issue as an affirmative defense at trial or as grounds to set aside an accusatory pleading prior to trial. But he is not immune from investigation or arrest. Under the circumstances of this case, Deputy Mosely had probable cause to search defendant's car at that point when he first smelled the odor of marijuana coming from the car. Defendant's admission that he had been smoking marijuana, and the deputy's observation of two baggies, only served to strengthen that probable cause. Whether or not defendant possessed a medical card or a physician's authorization (inappropriately referred to as a "prescription" in the case decision) does not detract from that probable cause nor shield defendant from a reasonable investigation. "An officer with probable cause to search is not prevented from doing so by someone presenting a medical marijuana card or a marijuana prescription." The deputy was entitled to continue the

investigation and conduct a search to "determine whether the subject of the investigation is in fact possessing the marijuana for personal medical needs, and is adhering to the eight-ounce limit on possession (as provided for in Health & Saf. Code, 11362.77, subd. (a))." He was therefore lawfully detained and his car was lawfully searched.

NOTES:

United States v. Diaz-Castaneda

(9th Cir. 2007) 494 F.3d 1146

SUBJECT: Computer Checks on License Plates and Passengers

RULE: Forcing entry into the suspect's home in the execution of an arrest warrant requires that there be a "*fair probability*" that he be home at the time.

FACTS: Defendant lived on the Fort Hall Indian Reservation in Idaho, and was well-known to local law enforcement due to his prior felony criminal history. In July, 2003, defendant consented to the search of his home, resulting in the recovery of an assault rifle and drug paraphernalia. No charges were filed at that time. Diaz worked as a mechanic from his home. Over the next 18 months, police visited defendant some 3 or 4 times and he usually answered the door himself, but once took 45 minutes to answer. In all but one instance, he was home. He told officers that they could usually find him at home, at least during the day. During these visits, defendant's black SUV was also usually there, but not always. Finally, in February, 2005, defendant was indicted for the weapons and paraphernalia possession from 2003 and a warrant was issued for his arrest. With this warrant in hand, officers from several law enforcement agencies surrounded defendant's house. Impeded by defendant's dogs and surveillance cameras, the officers merely watched from a distance for about an hour and a half. Two people could be seen in front of defendant's house. Defendant's SUV was not seen (although it was later found parked in a shed). One person, who did not appear to be defendant, drove away in another vehicle. Finally, surmising that the remaining individual must be defendant, the officers went up to his home and knocked, but no one answered. The officers could not see inside because of blankets covering the windows. After waiting a reasonable time, they finally forced entry. Although defendant was not found, the officers did find a baggie of methamphetamine. A search warrant was obtained resulting in the recovery of the meth and some "drug equipment." Defendant was later found at a nearby casino and arrested. Charged in federal court, defendant's motion to suppress the evidence as the product of an illegal entry was denied. Convicted after a jury trial, defendant appealed.

HELD: The Ninth Circuit Court of Appeals affirmed defendant's conviction. Defendant's argument on appeal (as it was in the trial court) was that the officers did not have sufficient cause to believe he was home when they forced entry into his house. The methamphetamine and the later-obtained search warrant, according to defendant's argument, were the products of that unlawful entry. The officers in this case had a warrant for defendant's arrest. But an arrest warrant alone is not enough to get a police officer into a suspect's home. Per the U.S. Supreme Court (*Payton v. New York* (1980) 445 U.S. 573.), a non-consensual entry into a residence for the purpose of executing an arrest warrant is lawful only when the officers have a "*reason to believe*" defendant is in fact in the house at the time. While courts have for some time debated what this means, it has pretty much been accepted now that this requires "*probable cause*" to believe defendant is home. (*United States v. Gorman* (9th Cir. 2002) 314 F.3d1105.) "*Probable cause*" is legally defined as "facts and circumstances within (the officers') knowledge and of which they had reasonably trustworthy information (that is) sufficient in themselves to warrant a man of reasonable caution in the belief (that defendant is home) . . . ." (*Brinegar v. United States* (1949) 338 U.S. 160.) This, in turn, has been held to require only a "*fair probability*" [that the person will be found in a particular location, based on the totality of circumstances.] (*Illinois v. Gates* (1983) 452 U.S. 213.) In this case, defendant argued that all indications were that he was not home (e.g., neither defendant nor his car were seen; no one answered the door) and that the officers, therefore, were not acting reasonably in believing otherwise. The Court, however, noted that none of these factors necessarily meant that he was not home. To the contrary,

the officers knew that defendant was almost always home during the day, that he was often slow in answering the door, and that his car wasn't always there even though he was. Also, it was reasonable for the officers to assume that the one person who remained at the house when the other person drove off was probably defendant. This was enough to establish the necessary "*fair probability*" to believe that he was home at the time execution of the arrest warrant was attempted.

NOTE: The necessity for having "*probable cause*" to believe a suspect is home at the time when attempting to execute an arrest warrant is consistent with the California rule. (See *People v. Jacobs* (1987) 43 Cal.3d 472.) The United States Supreme Court, however, has never defined "*reason to believe*" for us. Had the Supreme Court intended in *Payton v. New York* for a probable cause standard to apply, they could, and would, have said so. But defining "*probable cause*" as requiring no more than a "*fair probability*" helps. "P*robable cause*" does not require us to be right; only that we be "*probably*" right, or even better than that; that there be only a "*fair probability*" that we're right.

NOTES:

United States v. Grigg

9th Cir. 2007) 498 F.3d 1070

SUBJECT: Detaining and Identifying Misdemeanor Suspects

RULE: Stopping and detaining a suspect to investigate a past, non-violent, non-continuing misdemeanor is not lawful, at least where there are other means available of making that identification.

FACTS: A Nampa, Idaho, resident called police to report that the kids in the neighborhood were, again, harassing him with loud music, as they had been doing for years. Specifically, on this occasion, defendant had been driving his Mercury Cougar up and down the street "booming music" several times in the preceding days. There was some evidence that defendant had been verbally warned by the police before. On this occasion, the complainant pointed out defendant's car parked in front of an address down the street. A minute after the officer arrived and as he was taking the information for the complaint, defendant got into his car and drove by them. But this time, defendant was driving lawfully, *and quietly*. Without taking any further steps to verify the existence of prior complaints or defendant's identity, the officer directed another officer, who had just arrived, to stop defendant. Upon making the stop, defendant immediately told the officer that he had a "hunting rifle" in the car. In fact, an SKS rifle (an unregistered automatic weapon) along with some ammunition for it, and some .380 caliber handgun shells, were observed on the seat. Defendant was patted down and arrested when he was found to be in possession of concealed brass knuckles. The officers had no intention of arresting defendant on the noise complaint because it was a misdemeanor that had occurred at some earlier time, and not in their presence. Idaho law (as in California) does not allow an arrest in such a circumstance. Defendant was charged in federal court with the illegal possession of an unregistered automatic firearm. In response to a motion to suppress evidence, the federal district court judge held that the traffic stop was a lawful detention, necessitated for the purpose of allowing the officers to determine defendant's identity as the perpetrator of the noise violation. Defendant appealed.

HELD: The Ninth Circuit Court of Appeals reversed. The trial court used the prior United States Supreme Court decision of *United States v. Hensley* (1985) 469 U.S. 221.) as authority for justifying the stop and detention of a suspect in a crime. Per *Hensley*, such a detention is allowed by a balancing of law enforcement's interest in crime prevention with the detainee's interest in personal security from government intrusion. The problem is that in *Hensley*, the suspected crime was a felony robbery. Where the person to be detained is a suspect in a robbery, or even a misdemeanor that carries with it the potential for repeated or on-going dangerous behavior (e.g., DUI, reckless driving, etc.), or an escalation in violence (e.g., domestic violence, battery, etc.) then that person may be stopped for the purpose of identifying him and/or stopping the dangerous activity. But in the case of non-violent misdemeanors, at least when it is something that has occurred in the past and is not continuing in the officer's presence, then the need to intrude into the person's right to be free from government interference is severely diminished. The stale misdemeanor at issue here was not one related to public safety factors: the potential for ongoing or repeated danger or escalating violence; it was a misdemeanor noise compliant. "(I)t is difficult to imagine a less threatening offense than playing one's car stereo at an excessive volume." The officers also had alternative means of identifying defendant, such as by checking the address where his car had just been parked or investigating the prior complaint that had been made. Under these circumstances, stopping and detaining defendant was unreasonable, even though the officer had reasonable suspicion to believe that Grigg had committed a misdemeanor in the past. The stop being illegal, the trial court should have suppressed the officer's observations and recovery of the illegal firearm.

NOTES:

United States v. Ramirez

(9th Cir. 2007) 473 F.3d 1026

SUBJECT: Probable Cause; "Collective Knowledge" Doctrine

RULE: The "*collective knowledge*" of officers involved in an investigation that amounts to reasonable suspicion or probable cause sufficient to justify action under an exception to the warrant requirement, permits an order or request to another officer, who has no independent knowledge of the case, to make a traffic stop, detention, arrest, or search.

FACTS: An arrest made by officers of the Glendale Police Department resulted in the discovery of a sophisticated secret compartment in the rear cargo area of a Mercury Mountaineer. Apparently, the Mercury was subsequently released. Twelve days later narcotics officers, including several who had viewed the Mercury during the earlier contact, observed defendants Beltran and Ramirez in the same Mercury during a different narcotics-related surveillance. The officers followed defendants to a parking lot where they met two other individuals. Beltran and Ramirez were observed receiving a gym bag from the other subjects in exchange for a yellow, manila-style envelope or box. Defendants entered the Mercury with the bag. The car could then be seen "rocking back and forth in [a] manner consistent with someone forcibly moving the vehicle" while defendants were in it, which led officer to believe the gym bag was being hid in the car's secret compartment. When Beltran and Ramirez left the parking lot shortly thereafter, the surveilling officers called for a marked patrol unit to make a traffic stop on the car, in order to avoid alerting defendants to the narcotics investigation, as an officer safety precaution. Knowing only that the Mercury was the target of a narcotics investigation, Officer Daniel Hulben stopped the car for straddling lanes, per Vehicle Code 21658. Finding that Beltran, who was driving, had only a Mexican driver's license, Hulben arrested him for driving without a valid California license (Vehicle Code 12500). Ramirez was transported to the police station, although not formally arrested. A drug-sniffing dog was brought to the scene and alerted on the rear of the Mercury. A subsequent search resulted in recovery of some eight kilograms of cocaine. Both defendants were indicted in federal court. Their motion to suppress the cocaine was denied. They both pled guilty and appealed.

HELD: The Ninth Circuit Court of Appeals affirmed. Because "lane straddling," unless it also interferes with other vehicles, and driving on a Mexican license are not illegal, neither could serve as the basis for probable cause for the vehicle stop and subsequent arrest. The Court (as did the trial court) evaluated the legality of the stop, arrest, and search based upon the applicability of the so-called "*collective knowledge*" doctrine. First, however, the Court noted that pursuant to Supreme Court authority (*Whren v. United States* (1996) 517 U.S. 806.), Officer Hulben's subjective reason for making the traffic stop (i.e. lane straddling) was irrelevant so long as there is *some* legal basis for the stop. It is also irrelevant whether the reasons Officer Hulben gave for arresting or transporting either defendant were correct, so long as there was some legal justification for their detention and arrest. Here, the stop of the car and its subsequent search were both based upon legally obtained information by the narcotics officers that, as conceded by both defendants, amounted to "probable cause" to believe that the car contained contraband. Pursuant to the "*collective knowledge*" doctrine, the information collected by the narcotics officers was imputed to Officer Hulben, despite the fact that the basis for establishing probable cause was not communicated to him at the time the traffic stop was requested. It is not necessary for the officer acting on the request or order to have personal knowledge of the facts and circumstances giving rise to probable cause for the detention, search, or arrest.

Based upon what the narcotics officers knew, therefore, the stop, arrests and search in this case were all legal.

NOTE: The Court describes two situations where the doctrine applies. (1) When a number of law enforcement officers are all working together with bits and pieces of information spread out among them. What each knows would be insufficient by itself, but when added altogether the total information amounts to reasonable suspicion to detain or probable cause to arrest or search. (2) When one or more officers, with information amounting to reasonable suspicion or probable cause, instruct a separate officer, who may be acting in ignorance of the facts, to detain, arrest, and/or search. There is some difference of opinion as to whether the "*collective knowledge*" doctrine applies in the first situation unless there is also shown to be some communication among the officers involved of the relevant facts supporting probable cause. The second situation is universally accepted as coming within the doctrine, and requires no such communication. This case falls into the second category.

NOTES:

Scott v. Harris

(2007) __U.S.__, 127 S.Ct. 1769,167 L.Ed.2d 686

SUBJECT: High Speed Vehicle Chases and the Use of Force

RULE: It is reasonable for an officer to end a dangerous high speed vehicle chase by pushing the suspect's vehicle off the road, even though such an action poses a high risk of death or serious bodily injury to the suspect, because of the danger and culpability posed by the suspect's actions.

FACTS: Plaintiff Victor Harris in this civil suit was clocked by a Georgia "county deputy" at 73 miles per hour in a 55 mph zone, at night. Turning on his blue flashing emergency lights only caused Harris to drive faster, resulting in an all-to-typical "high speed chase." Harris drove at speeds exceeding 85 miles per hour on what was, for the most part, a two-lane highway. Deputy Timothy Scott (defendant in the civil suit) joined the chase. Harris was eventually boxed in between police cars in a shopping center parking lot, but, by executing a few quick turns and while bumping Scott's patrol car, managed to escape. After some six minutes and 10 miles of this chase, Scott, who had taken over as the lead patrol car, radioed supervisors for permission to perform a "PIT" ("*Precision Intervention Technique*") maneuver. Scott was advised to "(g)o ahead and take him out." However, due to the excessive speeds, Deputy Scott determined that the PIT maneuver wasn't safe. So he simply "applied his push bumper to the rear of (Harris's) vehicle." This caused Harris to lose control, drive off an embankment, overturn, and crash. Harris was seriously injured as a result, rendering him a quadriplegic. He later sued in federal court alleging that by bumping and forcing him off the road, Deputy Scott used excessive force in "seizing" him; a Fourth Amendment violation. The federal district court judge denied Scott's motion for summary judgment (i.e., dismissal). The Eleventh Circuit Court of Appeal affirmed, noting that if Harris was able to prove what he alleged, a jury could find that Scott had used excessive force in seizing him and that Harris's Fourth Amendment rights had been violated. Scott petitioned to the United States Supreme Court.

HELD: The United States Supreme Court, in an 8-to-1 decision, reversed. Normally, without any trial testimony to draw from (a "summary judgment" motion being a pre-trial remedy), an appellate court must assume the truth of the responding party's (i.e., Harris) version of the facts. The issue at this point, therefore, was whether, as alleged by Harris, there are facts that would support a jury's finding that Scott used excessive force. In this case, however, as noted by the Supreme Court, there is an "added wrinkle." That "wrinkle" is a videotape of the chase itself as recorded by a camera in one of the pursuing patrol cars and submitted as evidence at the summary judgment motion. (See the tape at http://www.supremecourtus.gov/opinions/video/scott_v_harris.rmvb.) This tape tells a whole different story than as alleged by Harris. "Indeed, reading the lower court's opinion, one gets the impression that (Harris), rather than fleeing from police, was attempting to pass his driving test." The videotape shows a chase at "shockingly fast" speeds, swerving around more than a dozen other cars, crossing the double-yellow line numerous times while forcing cars traveling in both directions off the highway. Harris is also seen running multiple red lights and traveling for "considerable periods of time" inside the painted center divider and through left and right turn lanes. "Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serous injury." Taking into account the videotape, the Court found Harris's "version of events . . . so utterly discredited by the record that no reasonable jury could have believed him." The issue is whether, in bumping Harris's car and running him off the road as a means of ending the chase, Deputy Scott used excessive force under the Fourth Amendment. The Court first ruled that it is irrelevant whether Deputy Scott's actions constituted "deadly

force." "(A)ll that matters is whether Scott's actions were reasonable." Reasonableness is determined by balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." The actions of both Harris and Scott exposed others to a serious risk of harm. The difference, however, is that Harris's actions endangered any number of innocent people. Deputy Scott, on the other hand, sought merely to end Harris's unlawful and dangerous acts by exposing Harris alone to the risk of death or serious injury. Balancing these interests, Deputy Scott's actions were clearly reasonable. Lastly, the Court declined to rule that it would have been wiser for Deputy Scott to simply break off the chase and let Harris go. First, breaking off the chase wouldn't have necessarily guaranteed that Harris would discontinue his reckless driving. Rather, he might have merely concluded that the police were devising some other plan for his capture. Secondly, breaking off the chase would cause others to assume that all they need to do to escape from the police is to initiate a high speed chase. Because Deputy Scott acted reasonably in continuing the chase and forcing Harris off the road, summary judgment for the civil defendant (i.e., Deputy Scott) should have been granted.

NOTES:

Brendlin v. California

(2007) __ U.S. __, 127 S.Ct. 2400, 168 L.Ed.2d 132

SUBJECT: Detention of Passengers During a Traffic Stop

RULE: A passenger in a private motor vehicle is detained by virtue of being in the vehicle when the driver is stopped by police, thus giving the passenger standing to challenge the legality of the stop.

FACTS: On November 27, 2001, deputy sheriffs observed a vehicle without license plates, noting that a red temporary operating permit in the window of the vehicle had a visible number "11" on it. This indicated to the officers that the car's temporary registration was due to expire in three more days; i.e., at the end of November. And, in fact, an earlier radio check of that same car had resulted in information to the effect that a renewal of registration was being processed. The officers, however, decided to stop the car for the purpose of checking the validity of the temporary operating permit. While contacting the driver, the officer recognized the passenger (i.e., defendant) as one of the Brendlin brothers and knew that one of them had dropped out of parole supervision. Defendant's arrest on the warrant resulted in recovery of evidence indicating that defendant was involved in the manufacturing of methamphetamine. Charged in state court, defendant's motion to suppress this evidence was denied, defendant pled guilty and appealed, ultimately to the United States Supreme Court.

HELD: The United States Supreme Court unanimously reversed, holding that defendant, by virtue of being a passenger in a stopped motor vehicle, had been detained. If the traffic stop of the vehicle was illegal, then defendant's detention would also be illegal and the resulting narcotics evidence would have to be suppressed. In evaluating the existence of a detention, the test is whether, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Or, in a case where the person has no desire to leave, "whether 'a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.'" In the case of a passenger in a private motor vehicle, the Court was of the opinion that no "reasonable person in Brendlin's position when the car was stopped would have believed himself free to 'terminate the encounter' between the police and himself." A "sensible person," as a passenger in a stopped vehicle, would not expect the police to allow passengers to come and go freely. If the driver is stopped for a traffic-related offense, a "passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place." If the driver is stopped for something unrelated to his driving, a "passenger will reasonably feel subject to suspicion owing to close association" with the driver. The officer's subjective intentions are irrelevant unless and until those intentions are in some way communicated to the passenger. Therefore, defendant was detained upon the stop of the driver and had standing to challenge the legality of the traffic stop. The case was remanded back to the state court for further hearing on "whether suppression turns on any other issue."

NOTE: The most important point for officers to remember from this case is that, should you arrest the passenger for any reason, be sure to document in your report the reasons for his initial detention, i.e., the reasons for the traffic stop. You may ultimately decide to release the driver from the scene without a citation. However, since the passenger's detention began when you stopped the driver, even if the reasons for stopping the driver are completely unrelated to your reason for arresting the passenger, you will need to document these in your report to show that you had validly detained the passenger. In addition, be aware

that the Supreme Court never indicated how long the detention of the passenger is justified after the initial stop. It is likely that you may detain the passenger for some period of time after the initial stop, indeed possibly the duration of the traffic stop as long as the stop is not unduly prolonged. The court's rationale for detaining the passenger, i.e., officer safety because of the danger inherent in vehicle traffic stops, suggests that an initial period of time after the stop would certainly be justified. During any traffic stop, for officer safety purposes, an officer may order the occupants in or out of the vehicle as needed to control the scene without specific cause. (*Maryland v. Wilson* (1997) 519 U.S. 408, 414-415; *People v. Saunders* (2006) 38 Cal.4th 1129, 1134-1135; *People v. Vibanco* (2007) 151 Cal.App.4th 1, 14; *United States v. Williams* (9th Cir. 2005) 419 F.3d 1029, & 1032, fn. 2.) This detention "may continue at least as long as reasonably necessary for the officer to complete the activity the *Mimms/Wilson* order contemplates." (*People v. Hoyos* (2007) 41 Cal.4th 872, 894, referring to *Pennsylvania v. Mimms* (1977) 434 U.S. 106.) Finally, on a different point, the Supreme Court noted that when you stop a taxi or a bus, the passengers in these types of vehicles would not likely be held to have been detained in that a passenger in a "common carrier" does not have the same relationship to the driver as does a passenger in a private motor vehicle. Also, having been remanded back to the state court, this case is now ripe for a decision on whether it is lawful to stop a vehicle for the sole purpose of checking the temporary vehicle operating permit to see if it is valid. *People v. Nabong* (2004) 115 Cal.App.4th Supp. 1 has held this practice to be illegal. However, the issue is presently pending before the California Supreme Court in *People v. Hernandez,* review granted March 21, 2007 (S150038) (formerly 146 Cal.App.4th 773).

NOTES:

People v. Vibanco

(2007) 151 Cal.App.4th 1

SUBJECT: Vehicle Stops; Detention and Questioning of Passengers

RULE: During the course of a stop for a traffic infraction, officers may reasonably order a passenger to stay in or step out of the car for officer safety reasons, and thereafter ask the passenger for identification.

FACTS: Officers pulled over a car in a high crime area for having a cracked windshield and no front license plate. Four people were in the car. After the officers approached the car, one passenger (the defendant) got out of the car and started to walk away. The officers ordered the defendant back inside the car. As the defendant hesitated (either trying to figure out what he was being told, or deciding what he was going to do), an officer noticed a different passenger reach underneath her shirt into her waistband area. Recognizing that "too many things were going on," and that they were losing control of the situation, one of the officers ordered all the car's occupants to get out and to sit on the curb. As they did so, the other officer asked the defendant for identification. The defendant provided the officer a bogus driver's license and the officer eventually ended up arresting the defendant for an outstanding warrant. Pursuant to the arrest, a search was of the car was conducted that turned up evidence implicating defendant in various fraud-related crimes. The defendant made a motion to suppress on the ground he was unlawfully detained when the officers would not let him walk away and it was improper for the officers to ask him questions in the absence of reasonable suspicion he was involved in criminal activity. The People appealed.

HELD: As police officer for reasons of officer safety may, "as a matter of course," order the passengers of a car lawfully stopped for a traffic violation to get out of, or stay inside of, the car. In this case, the two officers were dealing with four occupants, one of whom was making furtive movements in the back seat at the same time as defendant, the other passenger in the back seat, was attempting to leave the car. If the officers had allowed the defendant to walk away, the possibility of a violent encounter could arise from two locations: one from inside the car and the other from defendant's location outside the car. The officers' attention could be distracted by the different movements of the various occupants of the car. Accordingly, the officers were justified in ordering defendant back in the car and then ordering all the passengers to get out of the car and to sit on the curb for officer safety reasons. Moreover, the officers were entitled to ask the defendant for identification so long as it did not unduly prolong the traffic stop, which it did not.

NOTES:

In re Jaime P.

(2006) 40 Cal.4th 128

SUBJECT: Juvenile Search and Seizure Probationary Conditions

RULE: The rule that a belatedly discovered Fourth Waiver search and seizure condition will not validate an otherwise unlawful search applies to juveniles as well as adults.

FACTS: Defendant was stopped in Fairfield while driving a motor vehicle for what the police officer believed was a violation of Vehicle Code section 22107 (failing to signal). However, the prosecution later conceded that section 22107 was not violated in that there was no "other vehicle (that) may be affected by the movement," as the section requires. Three other persons were in defendant's car at the time. When asked for a driver's license, defendant could produce only a school identification card. While talking to defendant, the officer noticed a box of ammunition on the car's front floorboard. After patting everyone down, however, the officer failed to find any firearms. When it was determined that no one had a driver's license, the officer impounded the car. An impound inventory search resulted in recovery of a loaded .44 caliber handgun beneath a rear passenger seat. Defendant later admitted that one of his companions brought the gun into the car but that they had all passed it around. It was later determined that defendant, an admitted gang member, was on probation and subject to search and seizure conditions (i.e., a "Fourth Waiver"). Defendant was charged by petition in Juvenile Court with possession of a loaded firearm (Pen. Code, 12031(a)(1)), among other charges. His motion to suppress the gun was denied despite the fact that the officer did not know about defendant's Fourth Waiver until after the stop and search. Defendant appealed. The Court of Appeal affirmed, noting California Supreme Court precedent holding that a belatedly discovered Fourth Waiver imposed on a juvenile probationer will justify an otherwise unlawful search. (*In re Tyrell J.* (1994) 8 Cal.4th 68.) The minor petitioned the California Supreme Court for reconsideration of this issue.

HELD: The California Supreme Court, in a 6-to-1 decision, reversed, holding that the rule of *In re Tyrell J.* is no longer valid. *Tyrell J.* was based upon the premise that requiring a police officer to have advance knowledge of a Fourth Waiver search condition imposed on a minor would be inconsistent with the "special needs" of the juvenile probation scheme, including the "goal of rehabilitating youngsters who have transgressed the law." *Tyrell J.* also noted the reduced expectation of privacy that a probationer enjoys, as well as how suppressing evidence in such a case would not advance the purposes of the Exclusionary Rule. Since *Tyrell J.* was decided, however, the Supreme Court ruled in *People v. Sanders* (2003) 31 Cal.4th 318, that the residence of an adult parolee (who is on a Fourth Waiver merely by virtue of being a parole) was not lawfully searched when the fact of the Fourth Waiver condition was not discovered until some time after the warrantless search. The Court's reasoning in *Sanders* was that to allow a search under these circumstances (i.e., no warrant and no exigent circumstances) "would legitimize unlawful police conduct." Since *Sanders*, and to some extent even before, many legal commentators have questioned the continuing validity of *Tyrell J.,* asking why the rule should be any different for juveniles than it is for adults. The Court here re-analyzed the three justifications for Fourth Waiver searches (i.e., (1) "special needs," (2) a reduced expectation of privacy, and (3) advancing the purposes of the Exclusionary Rule, including the need to deter police misconduct), as such justifications apply to juveniles. In so doing, the court determined that the theory of *Tyrell J.* was no longer valid. "(D)evelopments occurring subsequent to our *Tyrell J.* decision convince us that it was incorrectly decided, and that it has generated and will continue to generate inequitable and legally unjustified results unless we overrule it." In re-analyzing the above three factors, the court determined the following: (1) *Special Needs*: "(I)f an officer is unaware that a suspect is on probation and subject to a search condition, the search is not justified by the state's interest in supervising probationers or by the concern that probationers are more likely to commit criminal acts." (2) *Reduced*

Expectation of Privacy: While someone on probation (or parole) has a reduced expectation of privacy, that expectation has not been totally eliminated. A probationer has the right to expect that he will not be searched randomly, at will, by any officer who did not honestly believe he was doing so lawfully. (3) *Purposes of the Exclusionary Rule*: Encouraging officers to do searches illegally in the hope that it might later be justified by a belatedly discovered search condition does not advance the purposes of the Exclusionary Rule. Based upon this, it is now the rule that in order for a Fourth Waiver search to be valid, no matter what the circumstances and whether the target is an adult or a juvenile, the officer conducting the search must be aware of the existence of the search condition beforehand.

NOTE: If you wish to search a person, his car, his residence, or anywhere else, and you are not sure of your probable cause or whether you have the necessary exigent circumstances to justify doing it without a warrant, take the time *before you search* to check for a Fourth Waiver.

NOTES:

United States vs. Lopez

(2007) 474 F.3d 1208

SUBJECT: Suspicionless Parole Searches

RULE: A suspicionless Fourth Waiver Search of a Parolee's residence is lawful.

FACTS: Defendant was released on parole from a California prison. As with all California parolees, defendant agreed to, and signed a written waiver allowing for the "search and seizure" of his person, property or residence, without a warrant and without cause, by an agent of the Department of Corrections or any law enforcement officer. (P.C. 3067(a)) He soon absconded from his parole supervision, becoming a "parolee-at-large" with a warrant for his arrest. Defendant's parole agent received information that he was at a particular residence in Ontario, California. The agent and officers from the Ontario Police Department went to the residence where they observed defendant's mother and brother entering the house. After the brother later left the residence (getting stopped and busted for being under the influence of dope; a violation of his own parole), officers knocked at the front door. Defendant was observed through a window. He eventually (after the officers tried to break down the door) opened the door and submitted to arrest. A "*protective sweep*" of the house for other persons resulted in the discovery of an empty, clear plastic baggie in a bathroom. A complete parole search was done and methamphetamine and three firearms were recovered. Prosecuted in federal court, defendant's motion to suppress the dope and the guns was denied. He appealed from his guilt plea.

HELD: The Ninth Circuit Court of Appeals affirmed. Upon his release from prison, defendant agreed to submit his person, property and residence to a warrantless search by law enforcement, with or without cause; i.e., a "*Fourth Waiver*." The purpose of this requirement is to help reduce recidivism, promote public safety, and reintegrate parolees into productive society. The U.S. Supreme Court has held that this provision allows for a search of a parolee's person despite the lack of any reason to believe the parolee is again engaged in criminal activity. (*Samson v. California* (2006) __U.S., 126 S.Ct. 2193, 165 L.Ed.2d 250.) This has been held to be constitutional because a Fourth Waiver results in the parolee having a diminished "*expectation of privacy*." The Court here saw no reason, based upon the Supreme Court's analysis in *Samson*, not to extend this same rule to a parolee's residence. The suspicionless search of the defendant's residence, therefore, was lawful.

NOTE: The Court never discusses whether or not this was defendant's own residence. Once they see defendant through the window, with him being a "PAL" with an outstanding arrest warrant, they certainly had the right to go in and get him. But the Ninth Circuit's own prior case law tells us that there has to be at least "*probable cause*" to believe the parolee lives there in order to justify the later parole search of the residence itself. (*United States v. Howard* (9th Cir. 2006) 447 F.3d 1257.)

NOTES:

People v. Garcia

(2006) 145 Cal.App.4th 782

SUBJECT: Patdown for Identification

RULE: A patdown for identification is illegal.

FACTS: A police officer lawfully stopped defendant riding a bicycle at night without an operative headlamp; a violation of V.C. § 21201(d). When the officer asked defendant for some identification, defendant, who spoke limited English, said that he didn't have any. Not believing him, the officer attempted to pat defendant down, looking for some form of identification. Defendant mildly resisted, pulling away, causing the officer to use "a control hold just to gain control of him." Defendant was then handcuffed for safety purposes, and patted down. Feeling "a crystal grain-type substance" in Garcia's pants pocket that the officer recognized to be methamphetamine, he reached into defendant's pocket and retrieved the illicit substance and arrested him. Charged in state court with possession of methamphetamine, defendant's motion to suppress was denied. He was convicted and appealed.

HELD: The Second District Court of Appeal (Div. 6) reversed, finding the patdown for identification to be illegal. The Supreme Court in *Terry v. Ohio* (1968) 392 U.S. 1, allowed a police officer to pat a person down for weapons so long as the officer is able to articulate a reasonable suspicion for believing that the person may be armed and dangerous. Such a patdown, being allowed on a lower standard of proof than most searches, was justified by the need for a police officer to be able to protect himself from suspects bent on hurting him. However, "(t)his rule cannot be morphed into a new rule to justify a search for ordinary evidence, here evidence of identification." The People cited a couple of cases (i.e., *People v. Long* (1987) 189 Cal.App.3d 77; and *People v. Loudermilk* (1987) 195 Cal.App.3d 996.) where officers were allowed to search a defendant's wallet for identification on less than probable cause. However, both of these cases involved situations where the respective suspects had a wallet that was visible to the officer and the suspect denied having any identification. These cases did not purport to allow a patdown for a wallet that the officer did not already know existed. The patdown search here, therefore, was illegal. The meth should have been suppressed.

NOTE: There's really a fine line between this case and the cited cases where a detained suspect, although claiming not to have any identification, clearly had a wallet in his pocket that was visible or otherwise known to the officer. But fine line or not, at least we know where that line is. In *Long*, the officer asked the defendant to open his wallet and insisted on being able to watch as defendant thumbed through it for identification. In *Loudermilk*, the officer merely took the defendant's wallet from his pocket to check it for identification after defendant "lied to the officer and himself created the confusion as to his own identity." Absent knowing the suspect has a wallet, the rule is that you will have to take a suspect's word for it when he denies having any identification.

NOTES:

United States v. Mendez

(9th Cir. 2007) 476 F.3d 1077

SUBJECT: Traffic Stops; Questioning Beyond the Scope of the Stop

RULE: Officers may ask questions unrelated to the reason for which the detainee is detained, without any particularized suspicion, so long as such questioning does not unduly prolong the initial detention.

FACTS: Two gang unit detectives stopped defendant Mendez one evening in a "*gang area*" of Phoenix, Arizona, because his vehicle did not have a visible license plate or temporary registration tab. Mendez identified himself with a California identification card. The detectives asked him to step out of the car and patted him down for weapons, the legality of which was not challenged. While patting Mendez down, one detective noticed a tattoo on the defendant's hand. While the second detective went to the patrol car to run out defendant's information the first detective spoke more with Mendez. The detective noticed that the tattoo on Mendez's hand was gang related and asked, "Where are you from?" The defendant responded, "from the Latin Kings," which the detective knew to be a Chicago street gang. Mendez talked about his various tattoos and said he had left the Latin Kings "in good standing," moving to Arizona "to get away from all that, to turn his life around." Meanwhile, the records check on defendant came back clear, but the second detective had determined while at the patrol car that the defendant's temporary registration had expired. The second detective joined his partner and Mendez with the intention of telling the defendant about the expired registration. However, when he walked up to them he overheard Mendez say he had done some prison time. The second detective asked why he had been in prison, and the defendant responded that it was for a weapons offense. When the detective followed up by asking whether he had any weapons in his car, the defendant became agitated but then admitted to having a gun in the "driver's side handle." The detectives arrested Mendez and recovered a loaded, small caliber semiautomatic in the driver's side armrest, apparently evidence that he had not, in fact, "turned his life around." The entire incident lasted only eight minutes. The defendant was charged in federal court with being a felon in possession of a firearm, and filed a motion to suppress the gun arguing (1) that the detectives improperly interrogated him about matters unrelated to the purposes of the traffic stop, and (2) that the gun was the product of an unlawfully prolonged detention. The federal district court denied Mendez's motion. Mendez appealed from his subsequent conviction and 4½-year prison sentence.

HELD: The Ninth Circuit Court of Appeals affirmed the denial of defendant's motion to suppress. Defendant's argument was that it was a Fourth Amendment violation to ask questions unrelated to the original purpose of the traffic stop. Defendant also argued that the recovery of the firearm was the product of an unconstitutionally prolonged detention. The court here rejected both arguments. As for defendant's argument that the officers illegally questioned him about matters not related to the traffic stop, the U.S. Supreme Court has held, contrary to a rule set out in several prior Ninth Circuit opinions, that it is not a constitutional violation to ask questions on unrelated issues. Such questioning does not need to be justified by any reasonable suspicion to believe that it is relevant to anything. (See *Muehler v. Mena* (2005) 544 U.S. 93.) According to the Supreme Court, "'[M]ere police questioning does not constitute a seizure' unless it prolongs the detention of the individual, and, thus, no reasonable suspicion is required to justify questioning that does not prolong the stop." This being the rule, asking defendant about his criminal past, despite the lack of any "particularized suspicion" to believe that defendant's history was relevant, was lawful so long as it did not unduly prolong the traffic stop. As for the issue of a prolonged detention, the law is that an officer may not detain the subject of a traffic stop longer than it takes to warn the detainee, write the detainee a citation, or otherwise do what is necessary to carry out the purpose of that stop (absent new information that independently justifies a further detention). In this case, the court found that the gang-

related and weapons-related questioning of Mendez that led up to the discovery of the gun occurred while the second detective was conducting a records check and dealing with Mendez's expired registration. Under these circumstances, with the officers "diligently pursuing the purpose of the traffic stop," the detention was not "prolonged" beyond that time period it took to conduct the business of the traffic stop itself.

NOTES:

People v. Cantor

(2007) 149 Cal.App.4th 961

RULE: The duration and extent of a consent search is limited to what is reasonably understood to be the scope of that consent when given.

FACTS: Officers observed defendant commit some traffic violations (tailgating, changing lanes without signaling, and speeding) and attempted to make a traffic stop. Defendant failed to yield, ignoring their red light, and then their siren. Eventually, however, he pulled over and stopped, and as he did so, reached towards the floorboards. When asked to step out of his car, the officer noticed that defendant smelled of marijuana. He denied smoking any "weed," or having recent contact with anyone who did. Defendant appeared nervous. His hands were shaking and he avoided eye contact. Defendant denied hiding anything when asked why he had reached towards the floor. The officer then asked him: "*Nothing illegal in the car or anything like that*? *Mind if I check real quick and get you on your way*?" Defendant indicated that he didn't mind. Other than a stronger odor of marijuana, a search of the passenger area of the car failed to turn up anything. The officer took the car keys from the ignition and opened the trunk. Defendant did not object, but also did not do or say anything to assist or otherwise signal his approval of this part of the search. Finding nothing of interest there, the officer shut the trunk lid and proceeded to check under the vehicle's hood. He then rechecked the passenger compartment several more times. Still finding nothing after about 15 minutes of looking, the officer finally told defendant that he was going to have to bring in a police dog to sniff the car. Defendant, who was very cooperative and not objecting to how long this was taking, said okay. While waiting for the dog, the officer went back to the trunk again and began removing anything that could pose a hazard to the dog. In so doing, he found a wooden box. Defendant told the officer that the box was a vinyl record-cleaning machine. The officer could feel something inside shift as he handled it and observed a paper bag through a mesh screen on the side of the box. Using a screwdriver to remove some screws, the officer took off the back panel to the box, inspected the bag's contents and found 201 grams of cocaine. Defendant's later motion to suppress this contraband was denied. He appealed.

HELD: The Fourth District Court of Appeal (Div. 3) reversed. The prosecution bears the burden of proof on the issue of a warrantless search and whether the duration and extent of the search was within the scope of the consent given. The test is one of "*objective reasonableness*;" i.e., what would one reasonably understand the search to involve under the circumstances of the consent given. Defendant here agreed to a "*real quick*" "*check"* of his car. Fifteen minutes into the methodical search the officer had found nothing incriminating and at that point the officer's search went beyond being what could be understood as "*real quick*." Certainly, it did not include the dismantling of a piece of equipment found in the trunk by unscrewing its back panel. Having gone well beyond what a reasonable person would have believed defendant consented to, the search of the box was beyond the scope of the consent given. Defendant's suppression motion should have been granted.

NOTE: There have been similar circumstances where an officer will kind of down-play the potential scope or intrusiveness of a proposed search when requesting consent, and then take the consent as carte blanche authority to dismantle whatever it is that's being searched while taking most of the day to do it. This case draws a line on that type of tactic that you need to consider. The line is one of "*reasonableness*," which means different things to different people. But a little common sense will help you in determining where this line is when you're in that position. Using words that limit your search ("real quick") as in this case, or creating a setting where a reasonable person would believe that he can't limit or withdraw that consent (*United States v. McWeeney* (9th Cir.2006) 454 F.3d 1030) may invalidate the search. The Court's conclusion was that the line was crossed here.

NOTES:

People v. Williams

(2006) 145 Cal.App.4th 756

SUBJECT: Vehicle Searches

RULE: Impounding vehicles, even pursuant to statute, may be a Fourth Amendment violation unless necessary to prevent it from being a hazard to other drivers, or being a target for vandalism or theft.

FACTS: Defendant was observed by a Santa Monica police officer driving without his seatbelt on. Defendant pulled his car to the curb in front of his own house and legally parked it as the officer stopped him. Defendant had a valid driver's license but no proof of registration or insurance, the car being a rental. A computer check revealed that defendant had an outstanding arrest warrant. He was arrested and his car was impounded pursuant to V.C. 22651(h)(1). An impound inventory search of defendant's car resulted in recovery of a loaded gun inside a bag on the back seat. Charged with a violation of P.C. 12031(a) (possession of a loaded firearm), defendant's motion to suppress the gun was denied. He was tried, convicted, and placed on probation.

HELD: The Second District Court of Appeal (Div. 8) reversed. The gun was illegally seized during the inventory search because the car was illegally impounded. V.C. 22651(h)(1) allows a police officer to impound a vehicle when "an officer arrests any person driving or in control of (that) vehicle . . . ." However, statutory authorization to impound a vehicle does not "determine the constitutional reasonableness of the seizure" of that vehicle. In other words, the Fourth Amendment takes precedence over a statute. Under a police officer's "*community caretaking functions*," a vehicle may be constitutionally impounded only under limit circumstances. (*South Dakota v. Opperman* (1976) 428 U.S. 364.) As recently noted by the Ninth Circuit Court of Appeals, whether "impoundment is warranted under this community caretaking doctrine (and the Fourth Amendment) depends on the location of the vehicle and the police officers' duty to prevent it from creating a hazard to other drivers or being a target for vandalism or theft." (*Miranda v. City of Cornelius* (9th Cir. 2005) 429 F.3d 858.) In this case, defendant's vehicle was legally parked in front of his own house. There was no evidence that it was parked where it might create a hazard or be a target for vandalism or theft. Defendant had a valid driver's license and was in lawful possession of the vehicle. "No community caretaking function was served by impounding (defendant's) car." Having been impounded in violation of the Fourth Amendment, therefore, the resulting impound search was unlawful. The gun found during the search should have been suppressed.

NOTE: *Miranda v. City of Cornelius*, cited by this Court here, came down over a year ago; November 17, 2005. At that time, we were all put on notice that impounding a vehicle pursuant to a state statute might, absent some valid need to do so, be a Fourth Amendment violation as an unreasonable "seizure" of property.

NOTES:

People v. Verdugo

(2007) 150 Cal.App.4th Supp. 1

SUBJECT: Traffic Stops; Prolonged Detentions

RULE: Citing a vehicle's driver for failing to produce proof of insurance, per V.C. 16028(a), is prohibited unless the driver is also cited for some other offense or is involved in a traffic accident. Also, taking the time to verify the driver is insured after determining that he is not in violation of any other Vehicle Code section constitutes an illegally prolonged detention.

FACTS: San Bernardino County Sheriff's Deputy W. Martin was on routine patrol when he noticed defendant driving with an expired registration sticker on the rear license plate. Using his vehicle's computer system, the deputy verified through DMV that the registration was expired. He therefore made a traffic stop on defendant intending to cite him accordingly. Upon stopping defendant, Deputy Martin asked him for his driver's license, vehicle registration and proof of insurance. Defendant produced only a valid temporary registration (and, presumably, a driver's license). The temporary registration had been affixed to his rear window, but the deputy hadn't seen it because of the dark tint on the window. Defendant was unable to produce the required proof of insurance, however, so Deputy Martin cited him for failing to produce evidence of financial responsibility, per V.C. 16028. Defendant later made a motion to suppress, arguing that once he provided Deputy Martin with a valid temporary registration for the vehicle, Deputy Martin should have let him go. The trial court denied the motion and defendant appealed.

HELD: The Appellate Department of the Superior Court (San Bernardino) reversed. The initial traffic stop was legal. When Deputy Martin observed the expired registration tap, and verified via his computer that the vehicle's registration was no longer valid, he had a reasonable suspicion of a traffic violation sufficient to justify a traffic stop. The fact that a temporary registration sticker was in the window did not negate the deputy's reasonable suspicion because it was not visible to the deputy through defendant's tinted windows. The deputy, however, was justified in detaining defendant only as long as it took to ask for his registration and driver's license. Once the deputy discovered that the vehicle was properly registered, his justification for detaining defendant ceased. Continuing the detention for the purpose of verifying compliance with the requirement had defendant have evidence of financial responsibility constituted an illegally prolonged detention. Also, Vehicle Code section 16028, by its terms (subdivisions (b) & (c)), notes that a driver is only required to show evidence of financial responsibility if he is being cited for another Vehicle Code violation or is involved in an accident. Defendant here was neither cited for another offense nor involved in an accident. He could not be cited, therefore, for violating section 16028(a).

NOTE: It is a stronger argument that section 16028(b) and (c) preclude an officer from citing a driver for failing to produce proof of insurance when there is no other violation nor a traffic accident

NOTES:

People v. Dolly

(2007) 40 Cal.4th 458

SUBJECT: Anonymous Information and Detentions

RULE: An anonymous tip of a fresh violent crime with a detailed description of the suspect is sufficient, at least under the facts of this case, to justify defendant's detention.

FACTS: An unidentified male called 9-1-1 at 3:16 in the afternoon, reporting that he had just been threatened with a gun by a person who "mentioned a gang name." The anonymous caller described the suspect as a "light-skinned African-American male with a bandage over his left hand as though it had been broken." The suspect was reportedly in the driver's seat of a gray Nissan Maxima parked on the north side of Jefferson Blvd. at Ninth Avenue, in the City of Los Angeles. When asked for his name, the caller declined, expressing fear for his own safety, and hung up. As officers were responding to the scene, the same caller, now identifying himself only as "Drew," made a second call to report that the he had just driven by the suspect vehicle and that it was a black Nissan instead of gray. L.A.P.D. officers arrived within 2 to 3 minutes and found a black Nissan Maxima parked where the tipster had said it would be. There were three people in the car, but defendant, with a cast on his left arm, was in the driver's seat. Defendant was ordered out of the car. A loaded .38-caliber blue steel revolver was found underneath the front passenger seat. Defendant later admitted that the gun was his. Charged with being a felon in possession of a firearm, defendant's motion to suppress the gun was denied. Defendant appealed from his conviction. The Second District Court of Appeal, in split 2-to-1 decision, affirmed. Defendant petitioned to the California Supreme Court.

HELD: A unanimous California Supreme Court affirmed. The landmark case law on this issue (i.e., detaining an individual based upon no more than an anonymous tip) is the U.S. Supreme Court decision of *Florida v. J.L.* (2000) 529 U.S. 266. In *J.L.*, the U.S. Supreme Court ruled that an uncorroborated anonymous tip of a person armed with a firearm *does not* supply the necessary "*reasonable suspicion*" to stop, detain, and pat down that person when he is found. The Supreme Court also, however, noted that "*exigent circumstances*" (something more than that a particular person might be "passive(ly)" armed) *might* provide an exception to this rule. The California Supreme Court has previously held that, in considering the "*totality of the circumstances*," a "*contemporaneous description*" of a dangerous circumstance tends to lend reliability and sincerity to the tipster's information, thus supplying the "*reasonable suspicion*" needed to justify a detention of the person identified by the tipster as being the cause of the then-existing danger. (*People v. Wells* (2006) 38 Cal.4th 1078; a DUI suspect reported by an anonymous tipster "weaving all over the road.") In this case, we have an anonymous tipster reporting to police that a particularly described individual had just pointed a gun at him, threatening to kill him. The immediately responding police officers found the described suspect (cast on his arm and all) at the place he was reported to be. The Court rejected defendant's argument that because the assault was no longer occurring, the "exigency" was over, finding this fact to be irrelevant to the issue of the reliability of the tipster's information. Nor was the possibility, unsupported by any evidence, that the call was nothing more than a hoax sufficient to negate the existence of a reasonable suspicion sufficient to justify a temporary detention while the validity of the allegation was investigated. Lastly, the tipster in this case supplied a plausible explanation for wanting to remain anonymous, having just been threatened with death by a person with a gun, and who was possibly a gang member. In sum, this case involved "a firsthand report of violent criminal conduct requiring an immediate response to protect public safety." The 9-1-1 call was recorded, preserving the ability, to some extent, to review the caller's sincerity. The report was fresh, detailed, and accurate, as verified by the

officers who were on the scene within 2 to 3 minutes. Given the "*totality of the circumstances*," this was sufficient to establish the necessary reasonable suspicion to justify defendant's detention.

NOTE: The general rule is still that uncorroborated anonymous information alone, absent an exigency requiring an immediate law enforcement response and other circumstances tending to provide some degree of reliability and sincerity to the anonymous tipster, is *not enough to justify a detention or a pat down.*

NOTES:

People v. Lindsey

(2007) 148 Cal.App.4th 1390

SUBJECT: Anonymous Information and Reasonable Suspicion

RULE: Anonymous information reporting a contemporaneously occurring dangerous incident involving a gun, with an accurate, quickly verified description of the suspect and his location, constitutes sufficient reasonable suspicion to stop, detain, and pat the suspect down for weapons.

FACTS: Pittsburg, California, police received a 9-1-1 hang-up call that they traced to a particular residential address. Minutes later, a second call from that same address was received. This time the caller told the dispatcher that she did not want to be contacted or identified because she was afraid of retaliation, but that someone had just fired a gun outside her house. The caller described the suspect as a Black male with small pony tails, but said she did not actually see the suspect fire or hold the gun. Officer Charles Blazer, who had investigated prior murders and shootings in the area and knew it to be one of "high levels of drug and gang activity," arrived five minutes after receiving the call. The officer observed defendant—a Black male with small ponytails—walking with two other men. Defendant was wearing a jacket that hung down over the waistline of his sweatpants. He appeared to have something heavy in his pocket or waistband, having to hold his pants up at the waist. After watching the three men walk about a block and a half, during which defendant never removed his hand from his waistband, the officer made contact and asked them if he could speak with them. Defendant ignored the officer at first while he kept walking despite the fact that his two companions had stopped. Defendant soon also stopped. When told by the officer that he was investigating a call about shots being fired, defendant denied having a gun. Officer Blazer, not about to take defendant's word for it, told him that he was going to pat him down. Defendant started to submit, holding his left arm out at a 90-degree angle, but still held his right hand at his waistband. As Officer Blazer began to conduct the patdown, defendant suddenly turned and tried to run. He was tackled, however, and handcuffed. A quick search resulted in the recovery of a sock tucked into his waistband and which contained a fully loaded revolver with one empty shell casing. The gun smelled as if it had recently been fired. Another officer attempted to make contact with the person who had originally called 9-1-1. However, she refused to open the door, was adamant that she be left alone, and "didn't want much to do with the entire incident." Defendant was charged with being a felon in possession of a firearm, with seven (yes; count them, *SEVEN*!!!) prior strikes under the three-strikes law (P.C. §§ 667(b)-(i); 1170.12). His motion to suppress the gun was denied. He then pled guilty (getting 5 years in a gift of a plea bargain) and appealed.

HELD: The Court of Appeal affirmed. Defendant argued on appeal that because the information leading to the contact was nothing more than an anonymous tip, the officer did not have sufficient cause to detain and/or pat him down for firearms. All parties agreed that defendant was detained at that point when the officer attempted to initiate a patdown. The question here, therefore is whether there was sufficient reasonable suspicion to detain and pat defendant down at that point in time. Citing U.S. Supreme Court authority (*Florida v. J.L.* (2000) 529 U.S. 266.), the Court noted that it is a rule of law that a detention and a pat down for weapons—both of which require that the officer have a "*reasonable suspicion*" that the person detained be involved in criminal activity and, to justify a patdown, that he be armed—cannot be based upon anonymous information alone. There has to be some other independent information corroborating the anonymous informant. The California Supreme Court, however, has differentiated *J.L.* from a situation such as in the present case. (See *People v. Dolly* (2007) 40 Cal.4th 458.) First, the anonymous informant is calling about a situation involving a firearm that "poses 'a grave and immediate risk' to the caller and to

anyone nearby." Second; an anonymous call about a "contemporaneous threat" is not likely to be a hoax. Third; a firsthand contemporaneous description of the crime as well as an accurate and complete description of the perpetrator and his location, the details of which are confirmed within minutes by the police, lends some reliability to the information. And fourth; the caller provides a reasonable explanation for why he or she wants to remain anonymous. To one degree or another, all of these factors applied to this case. The net effect is to provide the responding officer with sufficient reasonable suspicion to detain defendant and, upon observing him holding his waistline in such a suspicious manner, pat him down for a firearm.

NOTES:

People v. Rivera

(2007) 41 Cal.App.4th 304

SUBJECT: Anonymous Information, Knock and Talks, and Consensual Searches

RULE: A "*knock and talk*" and the resulting consensual search of a residence are both lawful despite the fact that the initial contact was the result of an anonymous tip.

FACTS: Oceanside Police Officer Scott Hunter received a radio call concerning an anonymous tip that a subject named Juan Rivera, defendant in this case, was at a particular residence in Oceanside and that he had an outstanding warrant for his arrest. Without doing any checks on the name or the address given, Officer Hunter and a partner went to the address. At the residence they contacted a woman who said that she was the homeowner. She invited the officers in and consented to a search of the house for Rivera. Defendant was found in a shed in the backyard. Upon contacting him, defendant was found to have a large knife concealed beneath his shirt; a concealed dirk or dagger per P.C. 12020(a)(4). It was also determined that he had two outstanding traffic warrants and a parole warrant. Charged with possession of a dirk or dagger, defendant's motion to suppress the knife was denied by the trial court. On appeal, however, a split Fourth District Court of Appeal reversed, ruling that the initial contact between the officers and the homeowner, based upon an anonymous tip, was improper. The People appealed.

HELD: The California Supreme Court, in a unanimous decision, reversed. The issue on appeal to the Supreme Court was whether the officers, armed with no more than an anonymous tip, could make contact with the homeowner and seek permission to search her house. Defendant argued for a new rule to the effect that a police officer must corroborate an anonymous tip before contacting a homeowner and seeking her consent to enter and search that person's residence. The Court declined to establish such a rule. While an uncorroborated anonymous tip alone does not justify "*detaining*" someone (*Florida v. J.L.* (2000) 529 U.S. 266.), it does not prevent an officer from conducting a "*consensual encounter*." Going to someone's front door and making inquiries into possible illegal conduct, or even asking for permission to come in and search, follows the same rules as a consensual encounter of a person on the street. So long as the person contacted would have reasonably felt, under the circumstances, free to decline, there is no constitutional impediment to an officer making contact at their front door and asking for permission to search. The real issue here, not properly litigated per the Court, is whether defendant (as opposed to the homeowner) was lawfully detained and searched. The case was therefore remanded for a determination of this issue.

NOTE: The obvious importance of this case is in pointing out that a "*knock and talk*" at the door of someone's residence is no different than conducting a "*consensual encounter*" with someone on the street. The legal test is the same; i.e., whether a reasonable person under the circumstances would have believed that he was not required to talk to the officer. But be wary of other cases that have held that if you get too pushy at the front door, you might just convert your "*knock and talk*" into an "*investigative detention*." (E.g.; *United States v. Washington* (9th Cir. 2004) 387 F.3d 1060.) Such a detention would be illegal absent a reasonable suspicion of criminal activity. Anonymous information does *not* constitute a reasonable suspicion. (*Florida v. J.L.*, *supra*.) Remember: The key to keeping a knock and talk consensual is *not* to get so pushy that a reasonable homeowner, under the circumstances, would no longer have felt free to tell you to pound sand.

NOTES:

United States v. Crapser

(9th Cir. 2007) 472 F.3d 1141

SUBJECT: **Residential "Knock and Talks"**

RULE: A consensual contact with a person in his motel room does not require any suspicion of criminal activity.

FACTS: Multnomah County (Oregon) Deputy Sheriff Todd Shanks made a traffic stop and arrested a person who volunteered that "Gunner Crapser" (i.e., defendant) was staying at a local motel room rented by a dancer named Summer Twilligear. The arrestee had a pressure cooker supposedly belonging to defendant, and the officer knew that item could be used in the manufacturing of methamphetamine. Shanks found out that there was an outstanding arrest warrant for Gunner Crapser, but a note on the warrant warned that the name was an alias used by a third party. Enlisting the aid of other officers, Shanks went to the motel and confirmed that Twilligear had in fact rented room 114. Four officers went to the room 114 and one knocked on the door. Twilligear peeked out through a window. Deputy Shanks asked her if she would open the door so that they could talk and Twilligear nodded in agreement. However, it took her a couple of minutes before she actually opened the door and during that time the officers could hear what sounded like people moving things around inside. Eventually, Twilligear and defendant both came out of the room, shutting the door behind them. The subjects were questioned separately. At no time were they told that they couldn't leave, or in any way blocked from returning to the room. A records check revealed that defendant was not the person described in the arrest warrant. Although Twilligear denied having any methamphetamine with her at that time, she admitted to being a user. She also said that they had had other visitors in the room with them the night before. Defendant, who was noticeably nervous as compared to how he had acted when contacted by these same officers on a previous occasion, volunteered that he had a syringe in his pocket, showing it to the officers. The syringe had a clear fluid in it that the officer suspected was methamphetamine A consensual search of his person resulted in the recovery of more syringes and a small baggie of meth. Defendant then consented in writing to a search of the motel room. Twilligear also consented, but said that she wasn't responsible for the contents of a duffle bag in the room. Defendant told the officers that he had some firearms in the bag. Being a convicted felon, defendant was charged in federal court with being a felon in possession of a firearm and with being in possession of methamphetamine. His motion to suppress the evidence was denied by the trial court. Defendant then pled guilty to the firearm offense and appealed.

HELD: The Ninth Circuit Court of Appeals, in a split, 2-to-1 decision, affirmed. The Court first held that the contact at the motel was nothing more than a "*consensual encounter*," and not a seizure (i.e., "detention"). Factors that support this conclusion include the fact that the officers "polite(ly)" knocked, asking (as opposed to demanding) Twilligear to open the door, and then patiently waited outside even though it took her a full two minutes to finally comply. The officers made no attempt to enter the motel room when Twilligear and defendant came out. Although there were four officers, no more than two of them dealt with each person at any one time. The contact was in front of the motel in an area open to public view. While the officers were armed, they never attempted to draw defendant's attention to that fact. Neither defendant nor Twilligear were ever blocked from leaving, nor told that they couldn't go if they wanted. This, per the Court, was a properly conducted consensual encounter and did not implicate any Fourth Amendment issues. Defendant was not detained up until the point when the syringes and methamphetamine were recovered from his person in a consensual search. Even if it was not a consensual encounter, by the time defendant came out of the motel room the officers had sufficient cause to detain him had they chosen to do so. Aside from the fact that the officers had the right to check to see if defendant was the Gunner Crapser

listed in the outstanding arrest warrant, there were enough other suspicious circumstances connecting defendant to the possession or manufacturing of methamphetamine to justify a detention. Specifically, (1) the officers had some limited information from the earlier traffic stop, including the presence of a pressure cooker which the officer knew could be used in the manufacturing of methamphetamine, that defendant might be involved in manufacturing meth. (2) Twilligear took a full two minutes to open the motel room door while the officers could hear noises like people moving things around inside. (3) When defendant was contacted, he acted extremely nervous, contrary to how he had acted during a previous contact by the same officers. And (4), Twilligear admitted to being a methamphetamine user and that other people had visited the room the night before. This, all added together, gave the officers sufficient reasonable suspicion to detain defendant had they chosen to do so. While this reasonable suspicion would not have allowed the officers to force entry into the motel room, when defendant came out voluntarily, the officers could have detained him. Lastly, the defendant's consent to search his person, the motel room, and the duffle bag, were all voluntary even though at some point he was in custody. Being in custody does not mean he can't consent to being searched.

NOTES:

Frunz v. City of Tacoma

(9th Cir. 2006) 468 F.3d 1141

SUBJECT: Warrantless Entry Into A Residence

RULE: With information that a possible burglar is really no more than an ex-spouse possibly violating a restraining order by being in the former couple's house, police breaking in the door and confronting the occupant at gun point is not warranted.

FACTS: A complainant in Tacoma, Washington, called police to report that his neighbor's ex-wife (plaintiff in the resulting lawsuit) was in the neighbor's house and her car was parked out front. The complainant/neighbor had been asked by plaintiff's ex-husband, who was himself out of town, to watch his house for him. Responding police arrived within a few minutes but could not find any signs of a break in and no one would answer the door. They told the neighbor to call again should plaintiff return. An hour and a half later, the neighbor called again to say that plaintiff had returned, was in the house, and that she had answered the door to visitors. The neighbor also told police that he believed that plaintiff was subject to a restraining order which prohibited her from being at the husband's residence. (Unbeknownst to the neighbor, plaintiff had been given the house in the divorce and had been living there for a week, with the husband moving to California.) This time it took officers some 40 minutes to get to the house. But rather than just knocking as they had done before, they surrounded the house and broke in the back door. Inside, plaintiff was confronted at gunpoint in the kitchen, "slammed . . . to the floor" along with her visitors, and handcuffed. She was released after about an hour when the officers finally reached her divorce lawyer who confirmed that she was the lawful owner of the house. Plaintiff sued the officers in federal court (42 U.S.C. 1983). A jury found for the plaintiff, awarding her $27,000 in compensatory damage and $111,000 in punitive damages. The officers (and the City of Tacoma) appealed.

HELD: The Ninth Circuit Court of Appeals, in a blistering decision, affirmed. On appeal, the officers argued that the forced entry into plaintiff's home, drawing their weapons, handcuffing the occupants, and doing a protective sweep, was all justified in that they reasonably believed that a burglary was in progress and that plaintiff was the burglar. The Ninth Circuit didn't buy it. The officers knew ahead of time that the person in the house was the ex-wife of the person who they thought was the owner. When the officers responded the first time, no one felt the need to draw their guns or to break into the house. They knocked on the door in an attempt to talk to who they believed was merely the owner's ex-wife. When they returned after the second call, there were still no signs of a break-in. Other than the fact that the ex-wife appeared to be in the house, nothing else had changed. There was no reason to believe that they had anything worse than "some sort of spousal property dispute." Simply knocking again, contacting the plaintiff, and asking her why she was there was all that the circumstances called for. Breaking in with guns drawn and taking the plaintiff into custody was clearly unreasonable.

NOTES:

United States v. Black

(9th Cir.2007) 482 F.3d 1035

SUBJECT: Residential Entries; Welfare Checks

RULE: Under the theory of exigent circumstances, officers can enter a home without a warrant if they have an objectively reasonable belief a victim is injured inside the apartment.

FACTS: A female domestic violence victim called 911 from a store that was a two-minute drive from defendant Black's apartment. She told the dispatcher that Black had beaten her that morning in his apartment and that he had a gun there. She said she and her mother would be waiting in the victim's pickup truck outside the apartment for the police to arrive so she could retrieve her belongings. The first officer arrived at the apartment approximately three minutes later. He did not see the pickup truck or the women. Another officer confirmed the women were not at the store, and then responded to the apartment as well. Nobody answered the officers' knock at the front door. They walked around to the back of the apartment and found Black. Black said he knew the officers were investigating a domestic violence incident but denied knowing where the victim was. In fact, he denied living in the apartment. When Black became agitated, one officer patted him down for weapons and then, with Black's consent, seized the apartment keys from his pocket. Using the keys, officers entered the apartment to check for the victim, believing that she might be inside and injured. Nobody was in the apartment, but a gun was on the bed in plain view. Black was a convicted felon. Officers obtained a warrant for the apartment and seized the gun. Black was convicted in federal court of being a felon in possession of a firearm. He appealed the denial of his motion to suppress.

HELD: The Ninth Circuit Court of Appeals affirmed the denial of Black's motion to suppress in a 2-to-1 split decision. Black had argued that the warrantless entry of his home was illegal. The majority of the court held the facts supported a finding of exigent circumstances in that the officers had an objectively reasonable belief the victim was injured inside the apartment. Although the timeline was tight, given that the victim was two minutes away and the officer arrived in approximately three minutes, it was possible that the victim had beaten the officers to the scene and had been forced inside by the defendant at gunpoint and then injured. The fact that Black said he "knew" the officers were investigating domestic violence, coupled with his apparent lie that he did not live in the target apartment, yet held the keys, was evidence that Black had something in the apartment he did not want the officers to see – perhaps the injured victim. Using some very telling language, the court noted, "This is a case where the police would be harshly criticized had they not investigated and [the victim] was in fact in the apartment. Erring on the side of caution is exactly what we expect of conscientious police officers. This is a 'welfare search' where rescue is the objective, rather than a search for crime. We should not second-guess the officers' objectively reasonable decision in such a case." As such, the warrantless entry and the observation of the gun in plain view were lawful.

NOTES:

Los Angeles County v. Rettele

(2007) __U.S.__, 127 S.Ct. 1989, 167 L.Ed.2d 974

SUBJECT: Search Warrant Execution and Officers' Safety

RULE: It is reasonable to detain occupants of a residence at gunpoint during execution of a search warrant while the residence is checked for the suspects where deputies have information one of the suspects is armed even though the detainees do not match the description of the suspects and even though the detainees are ordered out of bed without being given a chance to clothe themselves.

FACTS: Deputies obtained a search warrant for two residences as a part of an extensive fraud and identity theft investigation. There were four suspects sought, all of whom were African-American, and three of whom were believed to be living in one of the two residences that was to be searched. Deputies learned that one of the suspects had a handgun registered in his name. Unbeknownst to the deputies, three months before the date the warrant was served, the house had been sold to a Caucasian family. After arriving at the first house, the deputies knocked on the door and it was answered by the teenage son of the couple that had bought the house. The son was ordered to lie down on the floor. The deputies then entered a bedroom with their guns drawn and found the couple that had bought the house. The deputies ordered them to get out of bed and show their hands. They protested they were not wearing any clothes. The male tried to put on some sweatpants but the deputies stopped him. The female stood up and tried, without success to cover herself with a sheet. Both were held at gun point for 1-2 minutes before the male was allowed to retrieve a robe for the female. Rettele was then permitted to dress. The couple were escorted from the bedroom into the living room where they sat for a few more minutes until the deputies realized a mistake had been made. The deputies apologized, thanked them for not getting upset, and left. The whole process took less than 15 minutes. All three members of the household then sued in federal court alleging that their Fourth Amendment rights had been violated on grounds the warrant had executed in an "unreasonable manner." The trial court dismissed the suit but the Ninth Circuit reversed the trial court's decision. The case then made its way up to the United States Supreme Court.

HELD: The United States Supreme Court reversed, reinstating the trial court's summary judgment in favor of the officers and the County. The High Court rejected the plaintiff's argument that a reasonable deputy would have terminated the search immediately upon discovering that the occupants were of a different race than the suspects because finding Caucasian persons in a house when deputies are looking for African-American suspects does not eliminate the possibility that the suspects were also living there. The Court noted that detaining the occupants of a residence "represents only an incremental intrusion on personal liberty when the search of a home has been authorized by a search warrant." Detaining the occupants of a house being searched is a useful tool in that process, helping to (1) prevent flight, (2) minimize the risk of harm to the officers, and (3) facilitate the orderly completion of the search. Considering the deputies had information that at least one of the suspects may be armed, detaining the Caucasian occupants until the house can be safety secured is reasonable. Moreover, making the occupants get out of bed and stand there uncovered was permissible and "perhaps necessary" in light of the fact that suspects sometimes sleep with their weapons. In the absence of any evidence that the occupants were required to stand there unclothed for any longer than necessary, the Fourth Amendment was not violated.

NOTES:

Macias v. County of Los Angeles

(2006) 144 Cal.App.4th 313

SUBJECT: Search Warrant Execution and Officer Safety

RULE: Forcing a detained person to stand in public with his genitals exposed for an hour, absent justification for doing so, is constitutionally unreasonable

FACTS: Detectives received information from a confidential informant that a gang member was selling methamphetamine from a garage attached to a house belonging to a man named Macias. The detectives also learned from the informant that the gang member stored weapons either in the garage or under the house although the gang member's activities were unknown to Macias who was a 60-year old retired college professor with significant hearing loss. Based upon this information, a search warrant (the legality of which was not contested) was obtained for Macias' home and garage. The warrant was executed at about 5:00 a.m. one morning. According to Macias' later filed civil suit, Macias was sitting on his toilet praying the rosary, naked from the waist down when officers entered his house. Macias claimed that three deputies burst into the bathroom with their guns drawn. Macias said that while he tried to signal to the deputies that he was deaf, they pulled him off the toilet, threw him to the floor, and dragged him outside. Macias alleged he was then forced to stand in his driveway with nothing on but a t-shirt, "with his genitals exposed," for roughly one hour even though his house was checked immediately and it only took about four minutes to determine that no one else was in the house. Macias later filed a civil suit in state court against the involved deputies and everyone up the chain of command, alleging that the deputies acted unreasonably in the manner they executed the search warrant. The civil defendants (the deputies) filed a motion for summary judgment (i.e., a motion to dismiss the civil suit prior to trial). The deputies claimed that when they entered, Macias was found standing in the hall wearing an over-sized t-shirt that covered his genitals and that he was respectfully led outside where he was held for about four minutes while a protective sweep of his house was conducted. The trial court granted the officers' summary judgment motion (i.e., dismissing the lawsuit), finding that Macias had failed to show a triable issue as to whether a reasonable officer would have understood that he was violating a clearly established constitutional right. Macias appealed the trial court's decision.

HELD: The court of appeal reversed the trial court's decision, agreeing with Macias that the trial court should not have granted the deputies' summary judgment motion. The court held that if Macias' allegations were to be believed (which they had to assume for purposes of summary judgment), then the deputies did in fact violate his constitutional rights. Specifically, the held it is a Fourth Amendment violation to detain a person incident to the execution of a search warrant in an unreasonable manner. Holding a half-naked person, with his genitals exposed, out on his driveway for an hour when it only took four minutes to determine that there was no one else in the house who might pose a danger to them, is "patently unreasonable."

NOTE: Because the question before the court was simply whether to allow the suit go forward, the court had to assume Macias' claims were true. The court did not decide whether Macias' allegations, rather than officers' claims, were, in fact, true. The court only decided that *if* the jury found the Macias' claims to be true, there would be a Fourth Amendment violation and the deputies would not be entitled to qualified immunity.

NOTES:

People v. Superior Court (Nasmeh)

(2007) 151 Cal.App.4th 85

SUBJECT: Vehicle Searches; Scope of a Search Warrant and the "Automobile Exception"

RULE: (1) A warrant that allows for the search of a vehicle also authorizes, even if not mentioned, the seizure of that vehicle and its later forensic examination for trace evidence. (2) With probable cause to believe a vehicle contains evidence of a crime, the vehicle may be seized and searched despite the lack of a search warrant. (3) A delayed search of the vehicle does not violate the Fourth Amendment.

FACTS: Jeanine Harms disappeared over the weekend of July 28-29, 2001. A missing person report was filed by a friend after no one could find her all weekend and she failed to come to work on Monday morning. Her car was parked in her driveway throughout the weekend. Checking her residence on Monday, it was noticed that a number of items appeared to be missing including the seat cushions and pillows from her couch and a rug that had been on the floor in front of the couch. Defendant's fingerprint was found in Harms' car. When defendant was contacted, he admitted to having gone to Harms' house with her during an evening (apparently Friday) that weekend, following her there in his own vehicle. According to defendant, the two of them talked for awhile before going to a corner market to get some beer. They returned to her residence and talked for another hour. Per defendant, Harms then decided that she was sleepy but told defendant he could hang around until he felt sober enough to drive. She then fell asleep on the couch where defendant later left her. Defendant denied any sexual contact with Harms and denied any knowledge about any missing items. He claimed, however, that as he was leaving, he saw a suspicious man in the neighborhood. A neighbor reported to police that he had heard a loud bang, similar to a gunshot, during the early morning hours on Saturday. Being the last person to see Harms alive, and because his fingerprint was found in her vehicle, Officer Steve Wahl of the Los Gatos-Monte Sereno Police Department obtained a search warrant for defendant's home, his vehicle and his person, authorizing him to search for (among other things) the items missing from Harms' home. Pursuant to this warrant, various items of clothing were seized from defendant's house but a visual inspection of his vehicle failed to reveal the presence of any evidence. So the car was towed to the police crime laboratory for forensic processing. This processing, however, took some 10 days to initiate, partially because Wahl had misplaced the keys to the car, and another 2 days to finish. The car was not released for another 12 days. Certain (unspecified) forensic (i.e., "trace" or "biological") evidence was found in the trunk area of the car. Defendant was later charged with Jeanine Harms' murder. He filed a motion to suppress the trace evidence seized from his car. At the hearing, Officer Wahl testified that although the search warrant did not specifically state that he could search for trace evidence, or that he was authorized to seize the car and take it to a laboratory for that purpose, he believed that the law allowed for both. The Superior Court judge disagreed and granted defendant's motion to suppress the forensic evidence seized from the vehicle's trunk. Specifically, the judge ruled that by looking for trace evidence, the officer had exceeded the scope of the search as authorized by the search warrant. The trial court further ruled that the so-called "automobile exception" to the search warrant requirement could not be used to justify the search of the vehicle in that the car was held too long, making the warrantless seizure and search of the car unreasonable. The People filed a pre-trial writ challenging these conclusions.

HELD: The Sixth District Court of Appeal reversed, ruling that with the trial court wrong on both issues, the evidence should not have been suppressed. As to the argument that the officer could not search for trace evidence, the Court ruled that with a warrant authorizing the search for the items missing from the victim's residence, searching for trace evidence that might have come from those items does not "offend the Fourth Amendment." Where the officer has a right, for instance, to be searching for the missing rug, he can lawfully

look for fibers from that rug without the warrant having to specifically say that. The warrant in this case (as is typical) commanded the affiant: "And if you find the same *or any part thereof*, to hold such property . . . ." (Italics added) "(*A*)*ny part thereof*" would include trace evidence. The Court further upheld the seizing and taking of defendant's vehicle to the laboratory for a more complete search. "If the police have probable cause to justify a warrantless seizure of an automobile on a public roadway, they may conduct either an immediate or a delayed search of the vehicle." A seized vehicle under these circumstances may be taken to a crime laboratory for whatever time is reasonably needed to undertake and complete the search. If this is permissible even without a warrant (see below), it may certainly be done with a warrant that authorizes a search, even if moving the car is not specifically mentioned in the warrant. Also, the Court found no constitutional violation merely because it took 10 days to begin, and another 2 days to complete, the search. Although P.C. 1534 gives an officer 10 days to execute a warrant, there is no constitutional violation when officers go beyond that limitation by only a couple of days and there is no showing of bad faith. Absent a constitutional violation, the resulting evidence will not be suppressed. The Court also overruled the trial court on the issue of whether the "*automobile exception*" to the search warrant requirement applied. Having probable cause to believe that there might be seizeable evidence in the car, the U.S. Supreme Court has made it clear than an officer may lawfully seize and search the whole car, and any containers found therein, without a warrant. Also, that warrantless search can happen either there, when seized, or at some later date. So even if there were some legal deficiencies with the search warrant, a warrant wasn't even needed. As to the length of time the car was held by police, the court found that (1) given the complexity of the investigation, holding the car for some 24 days was not unreasonable, and (2) "the passage of time between the seizure and the search of [a] car is legally irrelevant." The trial court, therefore, should not have suppressed evidence based upon the time it took to search the car and release it back to defendant.

NOTES:

United States v. Diaz

(9th Cir. 2007) 491 F.3d 1074

SUBJECT: Residential Entry to Execute an Arrest Warrant; Probable Cause

RULE: Forcing entry into the suspect's home in the execution of an arrest warrant requires that there be a "*fair probability*" that he be home at the time.

FACTS: Defendant lived on the Fort Hall Indian Reservation in Idaho, and was well-known to local law enforcement due to his prior felony criminal history. In July, 2003, defendant consented to the search of his home, resulting in the recovery of an assault rifle and drug paraphernalia. No charges were filed at that time. Over the next 18 months, police visited defendant some 3 or 4 times during which, as a mechanic working from his home, he usually answered the door himself. In all but one instance, he was home. He told officers that they could usually find him at home, at least during the day. During these visits, defendant's black SUV was also usually there, but not always. Finally, in February, 2005, defendant was indicted for the weapons and paraphernalia possession from 2003 and a warrant was issued for his arrest. With this warrant in hand, officers from several law enforcement agencies surrounded defendant's house. Impeded by defendant's dogs and surveillance cameras, the officers merely watched from a distance for about an hour and a half. Two people could be seen in front of defendant's house. Defendant's SUV was not seen (although it was later found parked in a shed). One person, who did not appear to be defendant, drove away in another vehicle. Finally, surmising that the remaining individual must be defendant, the officers went up to his home and knocked. No one responded, however. The officers could not see inside because of blankets covering the windows. After waiting a reasonable time, they finally forced entry. Although defendant was not found, the officers did find a baggie of methamphetamine. A search warrant was obtained resulting in the recovery of the meth and some "drug equipment." Defendant was later found at a nearby casino and arrested. Charged in federal court, defendant's motion to suppress the evidence as the product of an illegal entry was denied. Convicted after a jury trial, defendant appealed.

HELD: The Ninth Circuit Court of Appeals affirmed defendant's conviction. Defendant's argument on appeal (as it was in the trial court) was that the officers did not have sufficient cause to believe he was home when they forced entry into his house. The methamphetamine and the later-obtained search warrant, according to defendant's argument, were the products of that unlawful entry. The officers in this case had a warrant for defendant's arrest. But an arrest warrant alone is not enough to get a police officer into a suspect's home. Per the U.S. Supreme Court (*Payton v. New York* (1980) 445 U.S. 573.), a non-consensual entry into a residence for the purpose of executing an arrest warrant is lawful only when the officers have a "*reason to believe*" defendant is in fact in the house at the time. While courts have for some time debated what this means, it has pretty much been accepted now that this requires "*probable cause*" to believe defendant is home. (*United States v. Gorman* (9th Cir. 2002) 314 F.3d 1105.) "*Probable cause*" is legally defined as "facts and circumstances within (the officers') knowledge and of which they had reasonably trustworthy information (that is) sufficient in themselves to warrant a man of reasonable caution in the belief (that defendant is home) . . . ." (*Brinegar v. United States* (1949) 338 U.S. 160.) This, in turn, has been held to require only a "*fair probability*." (*Illinois v. Gates* (1983) 452 U.S. 213.) In this case, defendant argued that all indications were that he was not home (e.g., neither defendant nor his car were seen; no one answered the door) and that the officers, therefore, were not acting reasonably in believing otherwise. The Court, however, noted that none of these factors necessarily meant that he was not home. To the contrary, the officers knew that defendant was almost always home during the day, that he was often slow in answering the door, and that his car wasn't always there even though he was. Also, it was reasonable for the officers to

assume that the one person who remained at the house when the other person drove off was probably defendant. This was enough to establish the necessary "*fair probability*" to believe that he was home at the time execution of the arrest warrant was attempted.

NOTE: The necessity for having "*probable cause*" to believe a suspect is home at the time when attempting to execute an arrest warrant is consistent with the California rule. (See *People v. Jacobs* (1987) 43 Cal.3d 472.) The United States Supreme Court, however, has never defined "*reason to believe*" for us.

NOTES:

Gillan v. City of San Marino

(2007) 147 Cal.App.4th 1033

SUBJECT: Probable Cause to Arrest

RULE: Contrary to the general rule, probable cause to arrest is lacking where the alleged victim's various descriptions of sex acts committed by a suspect lack detail, are inconsistent in the telling, the victim has a motive to lie, and there is no independent corroboration.

FACTS: Shortly after her high school graduation, a 17-year-old former member of a high school girls' basketball team (referred to throughout the appellate court decision as "the accuser," as opposed to "the victim") told her psychiatrist, her mother, and her college basketball coach, that Patrick Gillan, her high school basketball coach, had committed a number of inappropriate sex acts with her while she was on the team. Eventually, Sgt. Street, a San Marino police officer and friend of the accuser's mother, interviewed her. She described for him several incidents of groping, attempts at oral copulation, and other unwanted sexual contacts that allegedly occurred in the past year. Sgt. Street decided to arrange a meeting between the accuser and Gillan with the accuser wearing a listening device. The next day the accuser approached Gillan after a basketball game and asked to speak to him alone. Telling Gillan that she needed to come to terms with the "touching, and things like that," Gillan asked her; "Touching? What do you mean?" She described for him one alleged incident where she said he put his hand down her shorts. Gillan denied any such incident had ever happened and accused her of making up stories. That same evening, Sgt. Street had the accuser telephone Gillan and again attempt to elicit some admissions. Gillan continued to deny any inappropriate contacts with her. Sgt. Street submitted the case to a Los Angeles deputy district attorney who interviewed the accuser. Sgt. Street informed a supervising deputy district attorney that he intended to arrest Gillan for the purpose of publicizing the incident, hoping more victims might come forward. The plan was to then book, fingerprint and photograph Gillan, and then release him pursuant to P.C. 849(b)(1) (i.e., "insufficient grounds for making a criminal complaint against the person arrested"). In the company of his attorney, Gillan turned himself in. He was in fact released after being booked. When released, San Marino Police Department gave him a "Detention Certificate," telling him that being taken into custody was recorded as a "detention only." (See P.C. 849.5) Gillan was suspended by the school pending an investigation. A press release was prepared, given to a news service, and widely circulated. A press briefing was also held where Gillan was identified by name, announcing that he had been arrested for assault with intent to commit a sex offense, per P.C. 220, and that he had "sexually molested a member of last year's girl's basketball team on several occasions," a 17-year-old. No new victims ever came forward. The District Attorney eventually declined to prosecute, noting the "lack of sufficient corroboration." Gillan resumed his coaching job. He eventually sued the City of San Marino and the Police Department (and others) in state court pursuant to Civil Code 52.1, alleging, among other accusations, that he had been arrested without probable cause. A jury found for Gillan and awarded him almost 4½ million dollars. Defendants eventually appealed.

HELD: The Second District Court of Appeal (Div. 3) affirmed, except to order a new trial as to the compensatory damages and reverse an award for attorney's fees. The primary issue was whether there was sufficient probable cause to arrest Gillan. The Appellate Court agreed with the trial court in finding that there was not. "Probable cause exists when the facts known to the arresting officer would persuade someone of 'reasonable caution' that the person to be arrested has committed a crime. [Citation.] '[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts . . . .' [Citation.] It is incapable of precise definition. [Citation.] 'The substance of all the definitions or probable cause is a reasonable ground for belief of guilt,' and that belief must be 'particularized with respect to the person to be .

. . seized.' [Citations.] '[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment'" Typically, information from a victim or a witness to a crime, "absent some circumstance that would cast doubt upon their information," is enough to establish probable cause. Such a victim or witness is generally considered to be reliable. "Information provided by a crime victim or chance witness alone can establish probable cause if the information is sufficiently specific to cause a reasonable person to believe that a crime was committed and that the named suspect was the perpetrator. [Citation.] 'Neither a previous demonstration of reliability nor subsequent corroboration is ordinarily necessary when witnesses to or victims of criminal activities report their observations in detail to the authorities.' [Citation]" In this case, however, the Court noted that the accuser's various accounts of the alleged sex acts "lacked sufficient detail or were inconsistent in the details provided." Referring to the various interviews of the accuser, they noted how her descriptions of the events tended to change with each telling. They also noted that before one of their games, Gillan had berated her as "worthless," apparently causing her some embarrassment, and that she had "repeatedly expressed her strong antipathy towards Gillan based on his treatment of her as a player on the basketball team apart from the alleged sexual harassment." Per the Court, probable cause is not established when you take into account the accuser's motive to hurt Gillan, her inconsistent accounts, the lack of detail in her descriptions of the various acts, the lack of any corroboration for her story, and Gillan's repeated denials.

NOTES:

John v. City of El Monte

(9th Cir. 2007) 505 F.3 d 907

SUBJECT: Probable Cause to Arrest

RULE: A victim's believable account of an alleged sexual abuse, supported by other consistent factors and the officer's training and experience, establishes probable cause to arrest.

FACTS: Ten-year-old Ashley got caught by her teacher, Margaret John, passing a note to another student. In the note, Ashley wrote that she "hop[ed] Ms. John dies today like poisoning her or something," and that Ms. John was "a fucken [sic] perv" and a "lesbian bitch." John took the note to the school principal who called in the police. Eric Youngquist, a ten-year veteran police officer with child abuse experience and training in interview techniques, conducted the investigation. Officer Youngquist attempted to interview Ashley at the school about why she's written that note but found her unresponsive. So he asked her if she'd rather do the interview at the police station, and she said she would. At the police station, Ashley described an incident where John touched her on her breast and on her vaginal area, both over her clothing. Youngquist interpreted Ashley's mannerisms, her reluctance to talk about the incident, and her refusal to go along with Youngquist's attempts to exaggerate what happened, as indications that she was telling the truth. Officer Youngquist also considered her note, written shortly after the incident and in secret to a friend, but without an apparent intent to cause Ms. John any trouble, as corroboration. Based upon all these circumstances, Officer Youngquist determined that he had probable cause to arrest John. When he attempted to interview John, she called an attorney who told her that prior to any interview to make sure she documented her request for an attorney. She told Officer Youngquist this at which time he told her that because she was requesting an attorney he couldn't interview her and had no choice but to arrest her. So he did. John remained in custody for 36 hours before being released when the district attorney declined to file charges. John then filed a civil suit in federal court alleging that she had been arrested without probable cause. The federal district court declined to grant Youngquist's motion for summary judgment (i.e., pre-trial motion to dismiss). Youngquist appealed.

HELD: The Ninth Circuit Court of Appeals reversed. The issue here is whether Officer Youngquist, under the circumstances and based upon the information he had at the time, had probable cause to arrest Ms. John. The Court held that he did, and that the trial court therefore should have granted his motion for summary judgment. "Probable cause to arrest exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe an offense has been or is being committed by the person being arrested." A court is to consider the "totality of the circumstances." In this case, Officer Youngquist didn't just accept Ashley's story on its face. Rather, he used his training and experience with child abuse cases, as well as using advanced interview techniques he'd learned, in evaluating her story. Youngquist tested Ashley's veracity and reliability in various ways which, in his experienced judgment, indicated to him that she was telling the truth. For instance, Youngquist provided a "false and exaggerated" version of the story she'd told him. Ashley didn't take the bait, but rather corrected him to a version that was consistent with what she'd already told him. Also, Youngquist reasonably believed that the note itself, written by Ashley shortly after the incident and under circumstances that were not in contemplation of litigation, tended to corroborate her story. These circumstances in their totality, and viewed objectively (i.e., as a reasonable officer would have), establish sufficient facts and circumstances upon which Officer Youngquist could deduce that he had "reasonably trustworthy information" establishing probable cause. The Court also disagreed with the trial court's conclusion to the effect that Officer Youngquist should have investigated Ashley's allegations further before arresting Ms. John. While it might have been prudent

for him to do so, that does not mean that he didn't have probable cause to arrest her when he did. The arrest, therefore, was lawful. The trial court should have granted Youngquist's motion for summary judgment.

NOTES:

Rodis v. City and County of San Francisco

(9th Cir. 2007) 499 F.3d 1094

SUBJECT: Arrests; Probable Cause

RULE: The possessing and passing of a counterfeit $100 bill is not a crime absent evidence tending to show a "fair probability" that the suspect knew it was fake and passed (or attempted to pass) the bill with an intent to defraud.

FACTS: Rodis, an attorney and an elected public official, purchased a few items at a drugstore near his office and paid with a $100 bill. The older, 1985-series bill aroused the cashier's suspicions because it appeared to have a texture different than genuine bills. The cashier took it to the store manager, who compared it with other $100 bills in the store's safe and noticed that they did not look and feel the same. While waiting for the manager to return the first bill, Rodis tendered a second $100 bill, which the cashier determined was authentic. The manager used a counterfeit detector pen on the first bill that indicated it was genuine. Still suspicious, however, the manager told Rodis he thought the bill was a fake and called the police. Four San Francisco Police Department officers eventually showed up and also looked at the bill. Although the officers never compared this bill with the second bill Rodis used to complete his purchase, or with the store's bills that the manager used in his comparison, they concluded that the bill might be counterfeit; a violation of 18 U.S.C. 472. Section 472, generally, makes it a felony to possess or use a counterfeit bill "with the intent to defraud." Without attempting to establish whether Rodis knew the bill was a fake or that he had the necessary "intent to defraud," the officers arrested him so that they could take him to the police station where it would be easier to complete the investigation by seeking an expert opinion from the U.S. Secret Service. Rodis was transported in handcuffs and in the back seat of a patrol car. While at the station, Rodis was detained in a holding area. After a 20-to-30-minute wait for the Secret Service to return their telephone call, and a 5-to-10-minute conversation with a Secret Service agent, it was determined that the bill was in fact genuine. Rodis was released and taken back to the drugstore.

Rodis sued the officers (and everyone else up the chain of command) in federal court for false arrest, among other allegations. The civil defendants' motion for summary judgment (i.e. to dismiss the civil suit prior to trial) was denied, at least as to the officers involved, with the trial court finding that the officers lacked evidence tending to support the belief that Rodis had an intent to defraud—an element of the charged offense—when they arrested him. The trial court also ruled that the officers were not entitled to qualified immunity from civil liability because the law on the issue was "*clearly established*," i.e. the officers should have known that they lacked probable cause of Rodis' alleged intent to defraud. The officers appealed.

HELD: A panel of the Ninth Circuit Court of Appeals, in a split, 2-to-1 decision, affirmed; agreeing with the trial court that the officers did not have probable cause to arrest Rodis. As noted by the Court, 18 U.S.C. 472 requires that the officers have probable cause of three elements; (1) possession of counterfeit money, (2) knowledge, at the time of possession, that the money is counterfeit, and (3) possession with the intent to defraud. The officers acknowledged on appeal that Rodis had in fact been arrested (as opposed to merely detained). They also agreed that they did not have any evidence of Rodis' intent to defraud, or that Rodis even knew that the bill he used was counterfeit. Their argument that the arrest of Rodis was lawful was based upon the theory that in establishing the existence of probable cause, it is not always necessary that there be specific evidence of each and every one of the elements as listed above. The officers asserted they had probable cause to arrest Rodis based solely on evidence suggesting the bill might have been fake, and

that it was not necessary to show a specific intent to defraud. The Court disagreed, noting there must be at least a "fair probability" of two "*mens rea*" components to prove this particular offense, knowledge (of the bill's counterfeit nature) and intent to defraud. "It is fundamental that a person is not criminally responsible unless criminal intent accompanies the wrongful act." The Court agreed with the officers when they argued that not every element needed to convict must necessarily be shown to establish probable cause. "However, this rule must be applied with an eye to the core probable cause requirement; namely, that 'under the totality of the circumstances, a prudent person would have concluded that there was a fair probability that the suspect had committed a crime.' In this case, however, the arresting officers had absolutely no evidence that Rodis intended to defraud the store or that he even believed that the bill was counterfeit. Also, there was some evidence, of which the officers were aware, tending to indicate that the $100 bill in question was *not* counterfeit. For instance, Rodis had other $100 bills in his possession that were genuine, one of which he used to make his purchase. A counterfeit detector pen showed that there was nothing wrong with the questioned bill. Based upon all these factors "no reasonable or prudent officer could have concluded that Rodis intentionally and knowingly used a counterfeit bill." The officers, therefore, did not have probable cause upon which to base an arrest. Their motion for summary judgment was properly denied.

NOTE: The lesson here is that mere possession of a suspicious bill is not enough to support an arrest. The Court was particularly critical of the officers' failure to question Rodis concerning his state of mind before arresting him. Assuming for the sake of argument that Rodis did in fact harbor a criminal intent, the likelihood of getting some good admissible statements from him to help prove his criminal intent would have been significantly greater had they attempted to question him before he had a chance to think up a good excuse and while he still had hope that he might be able to talk his way out of being arrested.

The Court also noted, as a factor weighing against an arrest, the fact that the officers knew that Rodis was a San Francisco attorney, a locally-elected public official, and someone who had strong ties to the community. While this factor is not to be used for the purpose of giving someone favorable treatment, the Court emphasized that it is relevant to the "totality of circumstances" evaluation of a probable cause determination.

NOTES:

People v. Leonard

(2007) 40 Cal.4th 1370

SUBJECT: Miranda; Custody, Interrogation, Due Process and Expectation of Privacy

RULE: A homicide suspect who is told that he is not under arrest and is free to leave is not "in custody" for purposes of *Miranda*. Recording a conversation between an in custody suspect and a relative is not a police interrogation and does note violate a suspect's due process rights. Also, having been warned that his conversation with his father would be monitored, he did not have a reasonable expectation of privacy.

FACTS: On February 12, 1991, two employees and a customer of a "Quik Stop" convenience store in Sacramento were shot dead. Money was taken from both cash registers. A week later, three employees of a nearby Round Table Pizza restaurant were murdered in the restaurant's scullery. Money had been taken from two of the three cash registers. A man in dark clothing, including a trenchcoat, had been seen at or near both homicide scenes. Defendant, who lived near both crime scenes, was questioned two days later when he was seen walking in the area wearing a similar trenchcoat. But, because he was quiet, timid, frightened, and confused, and appeared to be mentally disabled as a result of epilepsy, he was determined "not a likely suspect." His photograph was taken and he was released. Three and a half months later, defendant's photo was shown to several people who had seen the person in a trenchcoat near the murder scenes. Each person tentatively identified defendant. Detectives went to defendant's home and asked him to come to the station to provide fingerprints and answer some questions. Because defendant had epilepsy and could not drive, detectives drove him to the station, unhandcuffed, in the backseat. The 3½ hour interview was videotaped. Defendant was not advised of his *Miranda* rights but rather told that he was not under arrest, that he did not have to answer any questions, and that he was free to leave at any time. Asked to take a polygraph test, defendant declined to do so without consulting an attorney but agreed to answer questions. When asked if they could search his apartment, defendant again said no, at least until he could talk to an attorney. During this interview, defendant asked for permission to make several phone calls, calling a friend and then, twice, his father. The friend had suggested to defendant that he should leave, but defendant said that he wanted to "get it over with." After the calls to his father, defendant admitted to the officers that some bullets he had bought and given to his father were the same type of bullets the detectives had told him were used in the murders. Defendant was taken home. The detectives then went to defendant's father's home and retrieved a gun which, through ballistics, was later determined to be the murder weapon. Defendant was arrested and taken back to the sheriff's station. His father was asked to come to the station and allowed to talk with his son. Both defendant and his father were told that their conversation would be taped. During this conversation, defendant told his father that he had committed the murders and that he did these crimes alone. Using at trial the tapes of both his interview by detectives and his conversation with his father, defendant was convicted and sentenced to death. His appeal to the California Supreme Court was automatic.

HELD: The California Supreme Court unanimously affirmed. Among the issues litigated on appeal was the admissibility of the taped interview by detectives and his conversation with this father. Defendant argued that the statements obtained in the interview with the detectives were illegally obtained because he had not been advised of his *Miranda* rights. The Court noted that a *Miranda* admonishment and waiver is not necessary unless the defendant is in custody at the time of the interview. "Whether a person is in custody is an objective test; the pertinent inquiry is whether there was a formal arrest or restraint on freedom of

movement of the degree associated with a formal arrest." Under the circumstances of this interview, "a reasonable person in [the] defendant's position would have felt free to end the questioning and leave." Defendant, however, asserted that the issue was "whether a reasonable person with defendant's age, low intelligence (78 to 80), and developmental disability ("mild to moderate" brain damage) would have felt free to leave." Without conceding that these factors should be taken into account, the Supreme Court found that this initial interview was non-custodial. Defendant was told that he was not under arrest and that he was free to leave. He was in fact not arrested at the end of the interview. The interrogation room they used was unlocked. He was allowed to use the bathroom whenever he wanted. Defendant himself expressed a desire to stay and "get it over with." He also obviously understood that he could say "no" to various requests and consult with an attorney if he wished, having invoked that right in response to several inquires. Under these circumstances, no reasonable person, even with defendant's disabilities, would have believed that he was in custody and not free to leave. Defendant also challenged the admissibility of the taped conversation he had with his father because no one had advised him of his *Miranda* rights. The Court, however, held that while defendant at that point was clearly in custody, having just been formally arrested, there was no interrogation as the term is legally defined. *Miranda* does not apply unless custody coincides with an interrogation. An interrogation includes any "practice that the police should know is reasonably likely to evoke an incriminating response from a suspect." Defendant argued that the detectives should have expected defendant to incriminate himself when they let him talk to his father. However, prior U.S. Supreme Court authority has held that a suspect's "conversations with his own visitors are not the constitutional equivalent of police interrogation." Noting "that the purpose of *Miranda* is to 'prevent government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestricted environment,'" the Court held that the detectives' hope that defendant would make incriminating statements to his father does not make it an interrogation. There being no interrogation, a *Miranda* admonishment was not a prerequisite to the admissibility of his statements to his father. Next, defendant argued that both sets of statements should not have been admitted into evidence as a 14th Amendment due process violation. Under the 14th Amendment, coerced (i.e., involuntary) statements, being potentially unreliable, should not be allowed. Defendant here argued that due to his limited intelligence and developmental disability, his lack of experience with law enforcement, the fact that the interrogation took place in a small, windowless room, the length of the interrogation (3½ hours), and the fact that defendant had to rely upon the detectives for a ride home, all worked together to make the statements obtained in both situations due process violations. The Court disagreed. The 14th Amendment is not violated absent some coercive police activity. The detectives here, however, did nothing to affirmatively coerce defendant into talking. To the contrary, they repeatedly told him that he was not required to talk to them. Lastly, defendant complained that taping his telephone call to his father violated the Fourth Amendment, the California Constitution's right to privacy, and Title III of the federal Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3711). The Court, however, found that none of these provisions are violated where a suspect is warned that whatever he says will be recorded. Under these circumstances, defendant did not have a reasonable expectation of privacy. His statements, therefore, were properly admitted into evidence against him.

NOTES:

People v. Thornton

(2007) 41 Cal.4th 391

SUBJECT: Interrogations; Using an Unwitting Agent

RULE: Putting a relative with a defendant, prior to his arraignment, and recording their conversation, is not a Fifth, Sixth, or Fourteenth Amendment violation.

FACTS: Defendant, a 19-years-old piece of crap with absolutely no redeeming social value, needed a car to use in his plan to kidnap his 16-year-old former girlfriend of two months; Stephanie C. Upon seeing Kellie Colleen O'Sullivan in her Ford Explorer in a parking lot in Ventura County, defendant abducted her at gunpoint and drove her to a remote part of Mulholland Drive in the hills above Los Angeles. He took her to an area of heavy brush and shot her to death with a gun he had stolen some months earlier. After stopping to have "*Stephanie*" tattooed on his shoulder, he drove to Stephanie's work intending to kidnap her. However, Stephanie's mother was picking her up from work. So defendant waited until Stephanie and her mother got home before he confronted them both at gunpoint, forcefully taking Stephanie while firing a shot at her mother, missing her. Listening to a police scanner he'd purchased earlier with a forged check, defendant drove Stephanie north-bound. He eventually took Stephanie to Reno, Nevada, via San Francisco (almost killing a cop there and getting into a road rage confrontation while there). In Reno, while defendant gambled, Stephanie sought the help of a casino security guard. Reno police responded and arrested defendant after an armed confrontation. With O'Sullivan's body yet to be found, Ventura County Sheriff's Sergeant Michael Barnes came to Reno to interview him. Defendant claimed to have stolen O'Sullivan's car which he found sitting unattended, with the key in the ignition. He denied knowing anything about O'Sullivan. Two days later, defendant had an extradition hearing in Reno where an appointed attorney told the court that defendant was invoking his right to counsel and to remain silent "as to this case, . . . and any other matter or cases or charges that are filed or pending or yet to be filed or pending as provided for under the 5th, 6th, and 14th Amendments . . . ." At the same time, the attorney instructed defendant on the record not to speak with anybody in Nevada or California except in counsel's presence. Defendant responded that he would follow that instruction. Four days later, Sgt. Barnes returned to Reno to escort defendant back to Ventura. On that same day, Kellie O'Sullivan's decomposed body was found. After bringing defendant back to Ventura, but before defendant had been arraigned, Sgt. Barnes arranged for defendant's grandmother to speak with him at the police station in the hope of obtaining incriminating statements. She was not told, however, to ask questions for them or otherwise act on their behalf. The police also did not tell her, at least initially, that they had found O'Sullivan's body. But while she was talking to defendant, they interrupted their conversation and told her out of defendant's presence that they had found O'Sullivan's body, suggesting that she tell defendant this. During the recorded conversation between defendant and his grandmother, defendant denied committing any violent crimes. However, he told her: "I don't care about her, I'm just tired." He also made some "consciousness of guilt" comments, such as expressing a fear of never leaving prison. The tape-recording of this conversation was played for the jury at defendant's later trial. Ballistics later showed that the gun taken from defendant when he was arrested was used to kill Kellie O'Sullivan. Defendant was eventually convicted of murder (and other charges) with special circumstances, and sentenced to death. His appeal to the California Supreme Court was automatic.

HELD: The California Supreme Court unanimously affirmed (with a modification of defendant's sentence on other counts). One of the issues on appeal was the admission into evidence of the taped conversation between defendant and his grandmother after being extradited but before arraignment. Defendant argued that this orchestrated meeting between him and his grandmother, "manipulat(ing)" her into speaking to him to

elicit incriminating statements, violated his Fifth, Sixth and Fourteenth Amendment rights. The Court, however, found no error in this evidence-gathering tactic. *Fifth Amendment*: Noting that the rule of *Miranda* is intended to protect a defendant from a custodial interrogations absent a waiver of his Fifth Amendment rights, the Court pointed out putting defendant's grandmother into an interrogation room with him did not constitute an "interrogation." An "interrogation . . . refers to questioning initiated by the police, or its functional equivalent, not voluntary conversation. . . . The 'functional equivalent' to express questioning involves police-initiated deceptive techniques designed to persuade or coerce a criminal defendant into making inculpatory statements." Merely placing a relative with defendant (at least as long as she is not acting as a police agent) is not conduct "reasonably likely to elicit an incriminating response." Here, grandma was not directed to ask any specific questions. To the contrary, defendant's grandmother was hoping to elicit information to exculpate, not incriminate, him. Under these circumstances, there was no police-initiated interrogation or its functional equivalent. Therefore, the Fifth Amendment was not violated. *Sixth Amendment*: The Court noted that defendant had not yet been arraigned on any of the California charges at thr point in time when his grandmother was allowed to talk to him. One's Sixth Amendment rights don't kick in until he's been arraigned. *Fourteenth Amendment*: Defendant's Fourteenth Amendment complaint was that using his statement about the victim that "I don't care about her" was "so fundamentally unfair as to violate . . . due process . . . ." The Court found no unfairness in the use of this statement against him. Admitting this statement into evidence was a discretionary call on the part of the trial judge. There was no abuse of this discretion here.

NOTE: As to the Sixth Amendment issue, the Court makes no mention of the fact that having been extradited, it is likely that as a precursor to the arrest warrant needed to get him extradited, a complaint had been filed. As to whatever charges were on that complaint (and they don't tell us whether, at that point, he had only been charged with kidnapping Stephanie, or it included charges related to the disappearance of Kellie O'Sullivan), defendant's Sixth Amendment rights had no doubt kicked in at the time Grandma was put in the interrogation room with him. Absent a knowing waiver of his Sixth Amendment rights, any evidence related to the already-filed charges shouldn't have been admitted into evidence. (See *People v. Viray* (2005) 134 Cal.App.4th 1186.) This issue was never discussed. The Court also never mentions the effect of defendant's Reno attorney's attempt to protect him, at his extradition hearing, when he (the attorney) said he was invoking defendant's rights "as to this case, . . . and any other matter or cases or charges that are filed or pending or yet to be filed or pending as provided for under the 5th, 6th, and 14th Amendments pursuant to *Miranda v. Arizona* and *McNeil v. Wisconsin*." Had this argument been made, however, he would have lost. Such an attempted invocation is commonly referred to as an "*anticipatory invocation*," and totally ineffective from a legal standpoint. (See *People v. Avila* (1999) 75 Cal.App.4th 416; *People v. Beltran* (1999) 75 Cal.App.4th 425.) But the main importance of this case deals with the tactic of putting a relative (or maybe a co-suspect) in with an arrested, but as of yet unarraigned, suspect. Just be careful that you don't tell your "informant" what to ask, or he will likely be held to be your agent and be held to the same standards as a law enforcement officer. If you do that, all the rules change.

NOTES:

People v. Smith

(2007) 40 Cal.4th 483

SUBJECT: Miranda; Invocations, Readmonishments, and the Use of Deception

RULE: (1) A suspect making inquiries about future access to an attorney is not an invocation. (2) Reinitiating an interrogation after a 12-hour break does not require a readmonishment of rights so long as the suspect still remembers them. (3) Police deception which is not so coercive so as to produce an involuntary or unreliable statement is not legally improper.

FACTS: Defendant was visiting his ex-girlfriend, Michelle Dorsey, and her brother, James Martin, in their Richmond, California, apartment, when he decided it would be a good idea to rob Dorsey. He took Dorsey's .32-caliber semiautomatic pistol from her dresser and, with the assistance of a 14-year-old friend, Joseph, confronted Dorsey in her bedroom. Defendant demanded that Dorsey open a safe she kept in her closet. When she refused, defendant shot her once in the chest, killing her. Martin called out from his own room, asking what had happened. Defendant and Joseph went to Martin's room where defendant also shot him, mortally wounding him. After taking money from Martin's wallet, they put Dorsey's safe in the trunk of her car and drove to the home of defendant's brother. The three of them broke open the safe and split the contents. The victims' bodies were discovered the next day by their sister. Defendant and Joseph were later arrested by a Richmond police officer driving Dorsey's car. Defendant was taken to the Richmond Police Station where he was advised of his *Miranda* rights. When asked if he waived his rights, defendant responded; "(*I*)*f I don't talk to you now, how long will it take for me to talk to you 'fore a person sent a lawyer to be here*?" Before the detective could answer, defendant continued: "*I could wait 'til next week sometime*," to which the detective responded equivocally; "*Maybe, yeah*." Defendant then told him; "*I'll talk to you now. I don't got nothing to hide*." Upon being told that he was under investigation for auto theft, defendant claimed that two other men had approached him asking for help to open Dorsey's safe. When later told that he was also a suspect in Dorsey's and her brother's murder, defendant admitted that although he had been present, it was Joseph and the other two men who had killed them. After about six hours of questioning, running into the early morning hours of the next day, defendant was booked for murder. The detective reinitiated the questioning some 12 hours later, first asking defendant whether he remembered being read his *Miranda* rights the day before and whether he was still comfortable talking about the case. Defendant responded that he "*pretty much*" remembered his rights and had no objection to talking further about the case. During this second interview (which lasted an hour and a half), the detective told defendant that he wanted to conduct a "Neutron Proton Negligence Intelligence Test" to purportedly determine whether defendant had recently fired a gun. Buying this ruse, defendant allowed his hands to be sprayed with a liquid soap and swabbed with a cocaine test kit, turning his hands a distinctive color. Defendant was told that he tested positive. Although still denying that he was the shooter, defendant then admitted that there were no other men involved, claiming that it was Joseph alone who had killed the victims. Tried for two counts of capital murder (along with a pile of other counts and allegations), defendant was found guilty with special circumstances. Following a sanity trial where the jury found him to be sane, and a penalty phase, the jury voted for death. His appeal to the California Supreme Court was automatic.

HELD: Except to reverse and dismiss one of the lesser charges, the Supreme Court unanimously affirmed. Among the issues raised on appeal were several involving defendant's interrogation and his incriminating responses. First, defendant argued he was misled when the detective told him; "*Maybe, yeah*," after defendant asked; "(*I*)*f I don't talk to you now, how long will it take for me to talk to you 'fore a person sent a lawyer to be here*? . . . *I could wait 'til next week sometime*." The Court found no error here in that

defendant, after stating that he understood his rights, never specifically asked for the assistance of an attorney nor indicated that he wished to end the interrogation. The detective, in his admittedly equivocal response ("*Maybe, yeah*."), did not actively mislead the defendant. And, the court found no authority for the argument that a defendant "cannot properly waive his Fifth Amendment rights (just because) he labors under (a) misapprehension of the mechanics of when and how counsel is appointed." His subsequent clear and unequivocal waiver, which immediately followed the above comments, was therefore valid. Second, defendant complained that he should have been readvised of his rights before being interrogated the second time. The Court rejected this argument as well. Whether or not a person needs to be readvised of his *Miranda* rights upon the reinitiation of an interrogation depends upon an analysis of five factors: (1) The amount of time between the two interrogations; (2) any change in the identity of the interrogator or the location of the interrogation; (3) whether the suspect was officially reminded of the prior advisement; (4) the suspect's sophistication or past experience with law enforcement; and (5) any further indicia that the suspect subjectively understands and waives his rights. Here, there was only a 12-hour break between interrogations. (The Court cited a prior case approving a 36-hour break.) Both interrogations involved the same officers at the same location. Defendant was reminded of the prior *Miranda* advisements and asked if he wanted to hear them again. And "defendant, with his prior criminal history, was quite familiar with the criminal justice system." Based upon this, there was no need to readvise defendant of his rights. Third, defendant argued that fooling him with the "deceptive tactic" of claiming to have conducted a gunshot residue test with a positive result, provoking him into changing his story about who might have committed the murders, made his responses involuntary and inadmissible. The Court rejected this argument as well, noting that police deception does not necessarily invalidate an incriminating statement. The question is whether such a ruse "was so coercive that it tended to produce a statement that was involuntary or unreliable." Here, even after the detective's ruse, defendant continued to deny that he was the shooter. But even so, the trick was not something that was likely to cause defendant to falsely confess. If he had not been the shooter, he would not have believed the ruse.

NOTE: Whenever a suspect even mentions "attorney," be careful about how you respond. This detective's "*Yeah, maybe*" after the defendant's comments showing some confusion about when he might have access to an attorney will inevitably be a serious issue when this death penalty case gets up before the Ninth Circuit Court of Appeals. In addition, although this case is consistent with the rule that ruses and subterfuges are lawful, at least as long as an interrogating officer does not say anything that might cause a false confession, this tactic is not recommended because juries do not like it. Jurors will find the fact that you lied neither clever nor amusing. And if they do not think you were honest and above board in all respects, they may think of some way to rationalize an acquittal or at least some other watered-down verdict. If used at all, ruses and subterfuges should be a last resort tactic only and not an everyday part of your interrogation tactic repertoire. Also, remember that you cannot use such a ruse as a means of obtaining a waiver. A *Miranda* waiver has to be "free and voluntary," and "knowing and intelligent." A ruse is proper, if at all, only after you have a valid waiver.

NOTES:

People v. Macklem

(2007) 149 Cal.App.4th 674

SUBJECT: Miranda; Beheler in the Jail

RULE: A jail inmate is not in custody for purposes of *Miranda* merely because he is an inmate. "*Custody*" in the jail (or prison) context requires that there be some restriction on the inmate's freedom over and above that inherent in the normal jail setting.

FACTS: The eighteen-year-old defendant was an inmate in San Diego County's George Bailey detention facility awaiting trial for having murdered his 17-year old former girl-friend. Defendant suffered from a number of psychological issues, including, among others, Asperger's syndrome (a less sever form of autism) and ADHD (attention deficit hyperactivity disorder). As a result, anger, impulse control, and aggressive assaultive-type behavior was not unusual for him. Housed in a special section of the jail reserved for very young, and very old, inmates, defendant's older diabetic cellmate, Ray Doane, asked the jail deputy for an extra tray of food. Defendant, thinking that this was unfair, wanted to complain to deputies. Doane put a bar of soap into a sock and swung it around, "loudly and aggressively" telling defendant about what happens to snitches in prison. Defendant took this as a threat. Later, with Doane asleep in his bunk, defendant attacked him, beating on him with a PVC pipe that had earlier been a leg to a chair. When Doane awoke and fought back, defendant pulled him to the floor and continued to hit and punch him until the fight was broken up by sheriff's deputies with pepper spray. Four days later, Sheriff's jail investigator Danielle Birmingham interviewed defendant, who (obviously) was still in custody. Defendant was contacted by deputies in his administrative segregation cell and asked if he wished to speak to the detective. Agreeing to this, he was brought in handcuffs to a "professional interview room;" i.e., one used for interviews by lawyers and doctors. Once there, the handcuffs were removed. He smiled and seemed happy to meet with the detective. Defendant was not advised of his *Miranda* rights. Rather, he was simply told that he did not have to speak with the detective and that he could return to his cell whenever he chose. Showing no hesitation, defendant stated that it was fine; that he would talk to her. Asked what had occurred between him and Doane, defendant admitted to having assaulted Doane, telling the deputy that although he (i.e., defendant) was a "smart guy," he was "just not wired right." In fact, if not stopped by the deputies in the jail, defendant admitted that he would have killed Doane. Convicted of first degree murder for killing his former girlfriend, and assault with a deadly weapon on his cellmate (acquitting him of an attempted murder charge), defendant appealed. Among the issued raised on appeal was whether the trial court properly admitted into evidence defendant's incriminating statements concerning his assault on Doane, obtained without benefit of a *Miranda* admonishment and waiver.

HELD: The Court of Appeal affirmed. Defendant's argument on the *Miranda* issue was that because he was a jail inmate, and obviously not free to leave, he was necessarily "*in custody*" for purposes of *Miranda* and should have been advised of his rights prior to being questioned by Detective Birmingham. Rejecting this argument, the Court noted that the case law is quite clear that just because a person is a jail inmate does not mean that he is necessarily "*in custody*" for purposes of *Miranda*. "*Custody*" in the jail (or prison) context requires that there be some restriction on the inmate's freedom over and above that inherent in the normal jail setting. In determining whether such a circumstance exists, thus requiring a Miranda admonishment, the Court took into consideration the totality of the circumstances including four specific factors: (1) The language used to summon the inmate to the interview; (2) the nature of the physical surroundings of the interview; (3) the extent to which the suspect is confronted with the evidence against him and the pressure exerted on him; and (4) whether there was an opportunity given to the inmate to leave the

site of the questioning. Thrown in for good measure was a fifth factor: (5) The fact that the inmate's interrogator was an investigator for the agency responsible for the jail, inquiring about an incident that occurred in the jail as opposed to someone from an outside agency inquiring about some other offense. In this case, the investigator sent deputies up to defendant's cell to ask him if he would talk to her. The interview took place in a "professional interview room," which is about as neutral of a setting as is available in a jail, with the door unlocked and ajar. He was otherwise unrestrained. The defendant was not confronted with any evidence against him, but was rather asked merely what he knew about the Doane incident. He was told that he did not have to talk to the detective and would be returned to his cell if and when he asked. And lastly, the detective was a jail investigator asking about a jail incident and not someone from an outside agency. With this, it is clear that nothing was done to elevate defendant's degree of custody over that of his status as an inmate. Therefore, defendant not being in custody for purposes of *Miranda*, no admonishment and waiver were required.

NOTE: The U.S. Supreme Court decision of *California v. Beheler* (1983) 463 U.S. 1121, has long stood for the proposition that "*custody*," at least for purposes of *Miranda*, can be taken out of almost any police-suspect interaction by merely telling the suspect that he is not under arrest and/or that he does not have to talk to the officer and can go free (or back to his jail cell, in the case of a jail inmate) whenever he wishes. No reasonable person having been told this would feel that he was "*in custody*" for purposes of *Miranda*. Interestingly enough, the Court here only mentions "*Beheler*" in passing, noting instead that telling a suspect that he doesn't have to answer the investigator's questions (i.e., what we in law enforcement commonly refer to as a so-called "*Beheler admonishment*") is merely one of the factors that needs to be considered.

NOTES:

People v. Perdomo

(2007) 147 Cal.App.4th 605

SUBJECT: Interrogating an Injured Suspect

RULE: A statement by a seriously physically injured suspect can still be deemed voluntary, so long as the totality of the circumstances show that he is speaking of his own free will rather than as a result of physical or psychological coercion.

FACTS: Defendant Perdomo and a couple of co-workers went to a bar in Simi Valley to celebrate defendant's 21st birthday, and got roaring drunk in the process. The defendant drove. Heading home at 2:45 a.m. on Highway 101 at 80 miles per hour with the two co-workers in the car, Perdomo lost control and hit the center divider, blowing out the left-side tires. The car swerved across the road and broadsided a tree. Perdomo and the front passenger were seriously injured. The rear seat passenger was pronounced dead on arrival at the hospital. Although there was some confusion at the scene, Perdomo was identified by those present as the driver of the car. Perdomo's blood test revealed a BAC of .221% one hour and 15 minutes after the accident. A urine test showed the presence of both alcohol and marijuana. Perdomo's injuries consisted of several broken ribs and a ruptured spleen, which doctors surgically removed. Perdomo also had some bleeding in the brain. Medical personnel would not let CHP investigators interview the defendant until four days later. When officers conducted the taped interview, the defendant was still in the intensive care unit. He had had a ventilator removed the day before but his voice was not overly raspy from the intubation. He was lying flat on his bed and still connected to I.V.'s and monitors. Perdomo had last received pain medication five and a half hours earlier and appeared to the officers to be in obvious pain. Perdomo's speech was slow and deliberate but not slurred. The interviewing officer read Perdomo his *Miranda* rights, which Perdomo acknowledged and waived. Perdomo's answers were responsive to the officer's questions. The officers spoke calmly, slowly, and deliberately throughout the interview. In a 20-minute interview punctuated by numerous pauses Perdomo admitted to being drunk, to having smoked marijuana, and to being the driver of the car. Charged in state court with felony vehicle manslaughter while intoxicated (PC 191.5(a)) and various felony drunk driving violations (i.e., VC §§ 23153(a) and (b)), the trial court denied Perdomo's motion to suppress his statements as involuntary. At trial, he testified that although he was drunk as a skunk (it was his 21st birthday, after all!), he couldn't remember whether he was the driver or not. His testimony was impeached by evidence of his admissions made to the CHP investigators. The surviving passenger also testified that he could not remember who drove. Convicted by a jury on all counts (and sentenced to six years in prison), defendant appealed, arguing that his statements made to the CHP investigators should not have been admitted into evidence in that, given his physical condition at the time, "his will [was] overcome by the two officers who exploited his debilitated physical and mental conditions through psychological coercion."

HELD: The Second District Court of Appeal (Div. 7) upheld Perdomo's conviction, finding the statement to be voluntarily given. A statement will be held to be "involuntary" (a "due process" issue) when it is not the product of the defendant's rational intellect and free will. Where a defendant claims psychological coercion, the issue is "whether the influences brought to bear upon the accused were such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined." A defendant's incriminating statements must be "causally linked" to some coercive police activity in order to justify the suppression of those statements. In support of his argument, defendant cited the U.S. Supreme Court case of *Mincey v. Arizona* (1978) 437 U.S. 385. In *Mincey*, the defendant was subjected to a three-hour interrogation within hours of having been shot by police. He was in the intensive care unit of the hospital with

tubes down his throat and nose, in extreme pain, and periodically lapsing into unconsciousness. The officer in *Mincey* ignored repeated requests by the defendant to halt the interrogation and for the assistance of an attorney. In contrast, Perdomo's interrogation in the present case occurred some four das after his injuries. While still obviously in pain, and probably somewhat under the influence of the pain medications, Perdomo was responsive, oriented, and could obey commands. His answers to questions were "remarkably detailed." The interrogation was subdued, in a conversational and non-threatening tone, with the officers posing their questions in a calm, deliberate manner. At no time did Perdomo attempt to halt the questioning or request the assistance of an attorney. "In short [contrary to what occurred in *Mincey*], the record is devoid of any suggestion the officers resorted to physical or psychological pressure to elicit statements from [Perdomo]." His statements, therefore, were voluntary and were properly admitted into evidence against him.

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